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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

In the Matter of Aspen Creek Estates, Ltd.,

Petitioner,

v.

Town of Brookhaven and The Town Board
of The Town of Brookhaven,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005), this Court held that where the government takes private property from one person and gives it to another person in order to promote economic development, a so called economic development taking, the taking must be executed pursuant to a "carefully considered" development plan.

This case concerns the Town of Brookhaven's (the "Town") efforts to condemn a 39.16-acre parcel of property owned by Aspen Creek Estates, Ltd. ("Aspen") so that it can be preserved as active farmland. The Town claims that the condemnation is necessary in order to, among other things, "help protect and promote [the] continuation of agriculture in the Town which is an important component of the local economy." App. 30a. The Town intends to take Aspen's property and transfer it to a private farmer by lease or in fee simple. The Town, however, has failed and/or refused to identify who or what will farm the property in the future.

Aspen challenged the condemnation because the Town failed to conduct any environmental or economic studies in support of the condemnation let alone a "carefully considered" development plan as required by *Kelo*. Aspen also argued the taking was a mere pretext to improperly bestow a private benefit on a local farmer who the Town refused to identify.

The New York Supreme Court, Appellate Division, Second Department held that the Town's condemnation was not an economic development taking and therefore confirmed the condemnation despite the fact that, in the court's own words, "the record is completely devoid of evidence pertaining to how the Town intends to use the property after the acquisition." App. 20a.

The New York Court of Appeals affirmed, concluding that the condemnation was constitutional, whether or not it was an economic development taking, because the property "was taken pursuant to a legislatively-declared public policy in favor of farmland preservation." App. 2a. The Court of Appeals' "public policy" standard directly conflicts with this Court's requirement in *Kelo* that economic development takings be executed pursuant to a "carefully considered" development plan.

The question presented is:

Whether the New York Court of Appeals erred in concluding that the taking of private property from one person so that it can be given to another person satisfies the Takings Clause of the Fifth Amendment to the United States Constitution where the property is taken pursuant to a "legislatively-declared public policy" rather than a "carefully considered" development plan?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Aspen Creek Estates, Ltd. has no parent corporation and no public company owns 10% or more of the corporation's stock.

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The opinion of the Court of Appeals of the State of New York (App., *infra*, 1a–2a) is reported at *Aspen Creek Estates, Ltd. v. Town of Brookhaven*, 12 N.E.2d 735, 904 N.E.2d 816, 876 N.Y.S.2d 680 (2009). The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department (App., *infra*, 5a–28a) is reported at *Aspen Creek Estates, Ltd. v. Town of Brookhaven*, 47 A.D.3d 267, 848 N.Y.S.2d 214 (2nd Dept. 2007).

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on February 17, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment to the United States Constitution which provides: "[N]or shall private property be taken for public use without just compensation." U.S. Const. Amdt. 5. That Clause is made applicable to the States by the Fourteenth Amendment. *See Chicago, B & Q.R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

STATEMENT OF THE CASE

Petitioner Aspen Creek Estates, Ltd. ("Aspen") owns a 39.16-acre parcel of property in Manorville, New York. The Town condemned Aspen's property on March 21, 2006 so that it could be preserved as farmland. The Town claimed that preserving the property as farmland would, among other things, preserve scenic vistas and promote the continuation of agriculture in the Town which purportedly was an important component of the local economy.

This Court recently held that where the government takes private property from one person and gives it to another person in order to promote economic development the taking must be executed pursuant to a "carefully considered" development plan. *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005). The Town here did not have a plan as admitted by the Town's counsel during oral argument before the New York Court of Appeals.

The Town did not prepare any studies let alone a "carefully considered" development plan in support of its condemnation and there is no such plan in the meager record below. The Town's condemnation also is completely silent on the critical issue of who or what will farm the property on a going forward basis and on what terms that individual or entity will continue to farm the property.

The Town's bare bones condemnation proceedings made it impossible to prove that the purported public benefits (which are not set forth in a development plan) are incidental compared to the private benefits (which will go primarily to an unidentified individual or entity).

These deficiencies are compounded by the limitations of the New York Eminent Domain Procedure Law (N.Y. EDPL) which does not allow for pre-taking discovery or a trial on disputed issues of fact – making it impossible for Aspen to ferret out who will be the primary beneficiary of this taking.

Aspen challenged the Town's condemnation by commencing a special proceeding in the Supreme Court of the State of New York, Appellate Division, Second Department ("Appellate Division") pursuant to N.Y. EDPL § 207.

Aspen alleged, among other things, that the condemnation violated its rights under the Takings Clause of the Fifth Amendment to the United States Constitution. App. 10a. Aspen argued that the Town failed to prepare an economic development plan as required by *Kelo* and that the purported public purposes identified by the Town in its findings and determinations were outweighed by the private benefits improperly bestowed on certain individuals. App. 18a.

Aspen specifically alleged that the Town's findings and determinations were a mere pre-text in order to allow the transfer of the property to a favored local farmer and to increase property values for Aspen's immediate neighbors by preserving their scenic views of the property.

On December 4, 2007, the Appellate Division confirmed the condemnation holding that it was not an economic development taking under *Kelo* because the primary objective was to preserve farmland and therefore the Town was not required to prepare a "carefully considered" development plan. App. 18a.

The Appellate Division reasoned that "[a]lthough the record is completely devoid of evidence pertaining to how the Town intends to use the property after the acquisition, the possibility that the Town may sell or lease the land to a farmer does not make the proposed condemnation a pretext for improperly conferring a private benefit." App. 20a.

The Appellate Division confirmed the condemnation over the strong dissent of Judge Lifson who concluded that "close scrutiny of the rationale offered by the Town offers only illusory benefits to the public and is a mere pretext for an impermissible taking." App. 28a.

On January 22, 2008, Aspen moved before the Appellate Division for reargument, or in the alternative, for permission to appeal to the Court of Appeals. On March 28, 2008, the Appellate Division denied Aspen's motion for reargument, but granted permission to appeal to the New York State Court of Appeals because "questions of law have arisen which ought to be reviewed by the Court of Appeals." App. 3a–4a.

At the Court of Appeals, the Town admitted that it did not prepare a plan to support the taking of Aspen's land. Despite this, on February 17, 2008, the Court of Appeals affirmed the Appellate Division's December 4, 2007 decision. The Court of Appeals' decision in this case is the first condemnation decision issued by the Court of Appeals since this Court's decision in *Kelo*. It is also one of the few instances in Court of Appeals history where New York's highest court has considered whether a condemnation pursuant to New York's Eminent Domain Procedure Law passes constitutional muster.

The Court of Appeals held that the Town's condemnation did not violate the Takings Clause of the Fifth Amendment to the United States Constitution. App. 1a–2a. The Court of Appeals reasoned that it did not need to determine whether the condemnation was an economic development taking because the property was "taken pursuant to a legislatively declared public policy in favor of farmland preservation."

The Court of Appeals held this general public policy in favor of farmland preservation, derived from a variety of sources, none of which directly concerned the property at issue, was sufficient to satisfy constitutional scrutiny.

The Court of Appeals also held that the public benefits of the taking in this case were not incidental or pretextual in comparison with the benefits accruing to private individuals. This despite the fact that the Town does not reveal who or what will ultimately receive the benefit of what the Town describes as 39.16 acres of "prime agricultural soil." App. 30a.

The Court of Appeals has adopted a watered down "public policy" standard which is a far cry from the "carefully considered" development plan required by this Court in *Kelo*.

The Town's condemnation is unconstitutional because there is no plan. There are no economic or environmental studies supporting the Town's finding and determinations. And, as the Appellate Division correctly noted, the record is "devoid of any information" concerning what the Town intends to do with the property after it is condemned.

The Town essentially has bifurcated the condemnation by voting to condemn the property now and deciding what to do with it later. The Town's failure to create a "carefully considered" development plan which specifies the future use of the property has deprived Aspen of an opportunity to attack the plan on constitutional grounds. There is no plan to attack.

The need for a comprehensive plan is particularly apparent in New York because the EDPL does not allow for pre-taking discovery or a trial on disputed issues of fact. In *Kelo*, the petitioner had the benefit seven-day bench trial in order to explore whether the condemnation improperly benefited private parties. *Kelo*, *supra*, 545 U.S. 475–476. Aspen has no such recourse under the EDPL.

The Town did not conduct any environmental or economic studies demonstrating that the protection and promotion of agriculture would in fact benefit the local economy or that the condemnation of Aspen's property in particular was necessary to satisfy this goal. The Town also failed and/or refused to disclose its plans for who or what will farm the property and on what terms they will continue to farm it in the future.

The Court of Appeals, however, upheld that condemnation based on its lenient and amorphous "public policy" standard. The Court of Appeals' decision should be reversed and the Town's condemnation vacated for the reasons set forth below.

REASONS FOR GRANTING THE PETITION

I. The "Public Policy" Standard Adopted by the New York Court of Appeals Conflicts with This Court's Decision in *Kelo v. City of New London*.

The Town's condemnation of Aspen's property is part of a long and continuing struggle between Aspen and the Town. Aspen purchased the property in June 2002 with the intention of subdividing the land and building 19 residential homes on two-acre lots. The property is zoned A Residence 2 which permits two-acre residential lots "as of right."

In or about November 2002, Aspen submitted an application to the Town's Planning Department to subdivide the property. The Planning Department, however, refused to accept or process the application without any explanation.

Aspen subsequently brought a special proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules (N.Y. C.P.L.R.) to compel the Town to accept and process its application. The Town eventually agreed to take the application pursuant to a "So Ordered" Stipulation in order to resolve the special proceeding.

The Town, however, still refused to submit the application to the Planning Board for a final decision despite the "So Ordered" Stipulation. Aspen subsequently brought a motion to hold the Town in contempt for failing to process the application.

Aspen's property is located in the Compatible Growth Area of the Pine Barrens region of Long Island which permits residential development as long as certain clearing limits are met. Aspen did not propose clearing any pine barrens vegetation but the Planning Department would not process Aspen's application unless Aspen agreed to dedicate large portions of the property to the Town so that it could revert to native Pine Barrens vegetation. The Town perversely delayed Aspen's subdivision application in order to promote the growth of pine barrens vegetation only to condemn the property to be used as farmland (which would destroy any native pine barrens vegetation on the property.)

Aspen agreed to dedicate the northern 14.85 acres of the property to the Town to be preserved as open space and to preserve another 10.85 acres in protected buffer areas. Aspen submitted over 48 revised subdivision maps over the course of several years in a futile attempt to gain approval.

The Town's Planning Board, under threat of contempt, finally rendered a decision on May 1, 2006 denying Aspen's subdivision application. The Planning Board denied Aspen's application because Aspen's subdivision plans allegedly did not do enough to preserve open space. This despite the fact that Aspen agreed to dedicate and preserve over 65.6% of its property. Aspen thereafter commenced another Article 78 proceeding challenging the Planning Board's decision as arbitrary and capricious.

While Aspen was attempting to obtain subdivision approval it simultaneously was engaged in a contentious legal battle with John Kennedy and W & K farms concerning the property. Mr. Kennedy, the owner of W & K farms, farmed the property before Aspen purchased it pursuant to an oral lease with the prior owners.

Mr. Kennedy owns (and farms) the 35-acre parcel immediately to the west of the Property and farms the 46-acre parcel immediately to the east of the Property. Mr. Kennedy continued to farm the Aspen's property without Aspen's permission after Aspen purchased the property. Aspen thereafter commenced an action in the New York Supreme Court, Suffolk County seeking to eject Mr. Kennedy from the Property.

The Suffolk County Supreme Court issued a temporary restraining order against Mr. Kennedy and subsequently granted Aspen's writ of ejectment. *Aspen Creek Estates, Inc. v. John Kennedy and W & K Farms, Inc.*, 15 Misc.3d 1124(A), 841 N.Y.S.2d 217 (N.Y. Sup. Ct. Suffolk Co. 2007).

The Town, however, targeted Aspen's property for condemnation while Aspen's subdivision application and writ of ejectment against Mr. Kennedy were pending. On January 24, 2006, the Town Board passed a resolution authorizing the commencement of condemnation proceedings against the property and scheduled a hearing for March 6, 2006.

Mr. Kennedy testified at the hearing and urged the Town Board to condemn Aspen's property so that he could continue to farm it:

> Yes, my name is John Kennedy. My wife and I own the property to the west of the [the property]. We have farmed [the property] for 23 years until Mr. Kaywood showed up. Our relationship has not been good. He's come into Town like a bull in a china closet. So this is where he wants to be and this is where he is. I do not, eminent domain does not sit well with me, but I don't see any other recourse here. My family has sustained economic hardship, losing 35 acres of production right next door to us. I'm very frustrated with the process. So whatever happens here tonight happens and then I will have to make hard decisions from there. Good night.

Several Manorville residents also testified in favor of the condemnation in large part because it would preserve their scenic views.

The record compiled by the Town in support of its condemnation consists of little more than a transcript of oral testimony at the condemnation hearing, google earth images of the property, a partially filled out Environmental Assessment Form and two letters from local civic associations offered in support of the condemnation.

On March 21, 2006, the Town Board voted to condemn the property purportedly to:

> preserve open space and agricultural resources; to preserve prime agricultural soils; *to help protect and promote continuation of agriculture in the Town which is an important component of the local economy*; to ensure the retention of scenic vistas; to protect the bucolic and rural character of the subject property, adjoining properties, and the Manorville Farm Protection Area; *to ensure the continued sale of fresh, locally-grown produce*; to prevent conflicts between residential homeowners and adjacent farmers; and to help ensure the preservation of the Manorville Farm Protection Area, a high priority preservation target which contains the largest contiguous belt of working farmland left in Brookhaven Town.

App. 30a (emphasis added).

The Town's condemnation was primarily based on oral testimony from the Town's representatives who claimed that Aspen's property was located in the Manorville Farm Protection Area ("MFPA"). The MFPA purportedly is a contiguous belt of 500 acres of farmland which the Town has marked for preservation.

The Town, however, has failed to cite any authority or legislation creating or defining the MFPA and there is nothing in the record below explaining what the

MFPA is or who created it. The MFPA is not a plan. It is rather nothing but a map, with condemnation targets identified. The MFPA is nothing but a group of farms or former farms (Aspen's land, for example, is not a farm today), which local officials have informally targeted for condemnation.

As noted above, Aspen challenged the Town's condemnation pursuant to EDPL § 207. Aspen argued the Town's condemnation was a pretext to improperly confer benefits upon private persons - namely Mr. Kennedy (who wanted to continue to farm the property) and Mr. Kaywood's immediate neighbors (who wanted to preserve their views). Aspen also argued that the Town was required to create a "carefully considered" development plan in order for the condemnation to pass constitutional muster.

The Appellate Division affirmed the condemnation and Aspen subsequently was granted permission to appeal to the New York Court of Appeals. While Aspen's appeal was pending before the New York Court of Appeals, the Suffolk County Supreme Court granted Aspen's separate petition seeking to overturn the Planning Board's earlier denial of Aspen's subdivision application. *Kaywood Properties Ltd. et al. v. M. Cecile Forte, et al.*, 19 Misc.3d 1143(A), 867 N.Y.S.2d 17 (N.Y. Sup. Ct. Suffolk Co. 2008)

In a remarkable decision, Justice Baisley determined that the Town had "deliberately delayed" processing Aspen's subdivision application and "concocted reasons to deny it as a pretext in order to enable the Town to complete its condemnation proceeding and acquire the property at a bargain price." *Id.* Justice Baisley annulled the Planning Board's May 1, 2006 denial, and remitted the application to the Planning Board with instructions to approve Aspen's subdivision application. *Id.*

On February 14, 2009, however, the New York State Court of Appeals affirmed the Town's condemnation of the property. The Court of Appeals, however, directly conflicts with this Court's holding in decision *Kelo v. City of New London* because it did not require the Town to create a "carefully considered" development plan.

A. The Town's Condemnation Is an Economic Development Taking

There are "three categories of takings that comply with the [5th Amendment] public use requirement . . . [t]wo [of which] are relatively straightforward and uncontroversial[,]" namely where the land in question is taken for public ownership to create public infrastructure such as "a road, a hospital, or a military base," or for control by "common carriers, who make the property available for the public's use – such as with a railroad, a public utility, or a stadium." *Kelo, supra,* 545 U.S. at 498 (O'Connor J., dissenting).

The Town's condemnation does not fit within either of these first two recognized categories of constitutionally permissible takings. The Town does not state what it will do with the property after the condemnation but there is no indication in the meager record below that the Town will make it available for public use. There is also no indication that the Town *itself* intends to farm the property either directly or through some sort of Soviet-style public collective.

The Town in all likelihood plans to take this property from Aspen and transfer it to a private farmer, John Kennedy, by lease or in fee simple to be farmed for a profit. The Town also claims that the condemnation is necessary in order to benefit the local economy.

The Town's condemnation therefore fits within the third recognized category of taking involving property destined for subsequent private use to satisfy an alleged public purpose – so called "economic development" takings. *Kelo, supra*, 545 U.S. at 498 (O'Connor J., dissenting). This is the only conceivable form of taking that the Town might be considering here, as nothing in the record below supports any other conclusion but that the taking in question falls within this third category, and must be scrutinized as such.

The Town Board's own findings and determination support the conclusion that this is an economic development taking. The Town Board stated that the purpose of the acquisition was, among other things, to preserve "agricultural resources" and "to help protect and promote continuation of agriculture in the Town which is an important component of the local economy" and "to ensure the continued sale of fresh, locally-grown produce" and "to prevent conflicts between residential homeowners and adjacent farmers" App. 30a.

In *Kelo*, the Supreme Court described the economic development taking at issue in that case as an effort "to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts." *Kelo, supra*, 545 U.S. at 483. That is exactly what the Town claims it is trying to do in this case. The profound difference, of course, is that unlike the carefully considered plan that the City of New London created in *Kelo*, the Town in this case has not created any plan for the future use of this property. *See* Discussion, *infra*, Part I(B).

In the proceedings below, the Appellate Division concluded that the Town's condemnation was not an economic development taking because the primary objective was to preserve farmland ignoring the fact that this property must be transferred in some form or fashion to another private citizen in order to be farmed. The Court of Appeals did not address whether the Town's condemnation was an economic development taking. The court held that the taking was constitutional, regardless of how it was characterized, because the property "was taken pursuant to a legislatively-declared public policy in favor of farmland preservation." App. 2a

B. The Town Failed To Create a Carefully Considered Development Plan.

The Town admits it created no plan in connection with the condemnation of Aspen's land. The watered down "public policy" standard adopted by the Court of Appeals is a far cry from the "carefully considered" development plan required by this Court in *Kelo*. The Court's "public policy" determination is based on a hodgepodge of legislative and non-legislative enactments initially identified by the Appellate Division when it confirmed the Town's condemnation, all of which are suspect.

The Court of Appeals specifically referenced the "Town of Brookhaven's master plans" which purportedly endorses farmland preservation. There is no reference whatsoever in the record or proceedings below concerning any such master plans.

The Court of Appeals apparently was referring to the Manorville Farm Protection Area (MFPA). As set forth above, however, the Town has failed to identify what the MFPA is – other than a map – or who or what created it. Judge Lifson, in his Appellate Division dissent, noted:

> [W]hile there are several references to a Manorville Farmland Protection Area in the record, no Town ordinance or formalized plan for the alleged preservation of the area in which the property is located is set forth. Instead, the respondents rely on vague reference to such designations as early as 1993 without being able to explain what the detailed plan was or is.

App. 26a.

The Court of Appeals also references certain bond acts in which the Town voters allegedly authorized $130 million to acquire development rights or fee interests in undeveloped land. The fact that Town residents approved the acquisition of other parcels does not constitute a carefully considered development plan in support of the condemnation of this parcel.

Judge Lifson correctly noted that the fact that bond proceeds "were used to acquire parcels of land or development rights within [the MFPA] is not proof of a coherent plan for preservation, or that the public acquisition of the entire tract (*i.e.* the property) and its use as farmland is essential to the furtherance of such an alleged plan."

The striking fact about all of the legislative and non-legislative enactments identified by the Court of Appeals and the Appellate Division is that they do not directly concern Aspen's property and were not taken in furtherance of this condemnation.

More importantly, however, even if we take the Court of Appeals' conclusion at face value – that there is a legislatively-declared public policy in favor of farm land preservation – that alone is not sufficient to justify the condemnation.

In *Kelo*, there was a legislatively enacted public policy in favor of clearing blighted areas. The City of New London condemned the property pursuant to a Connecticut statute which specifically stated that "the taking of land, even developed land, as part of an economic development project is a 'public use' and in the public interest." *Kelo*, *supra*, 545 U.S. at 476.

The inquiry, however, does not stop there. In *Kelo*, this Court still required a "carefully considered" development plan in order for the condemnation to pass constitutional muster. To hold otherwise would be to sanction the taking of property from one individual and so that it can be given to another as long as the condemning authority used the appropriate buzz words whether that be "clearing blight" or "preserving farmland."

The Town claims that this condemnation is part of a larger effort to preserve hundreds of acres of farmland within the MFPA which it claims will be good for the local economy. There is no indication that the Town ever considered how its entry into the local agricultural market will affect consumers or farmers. A farmer's land is normally his most important asset and the Town essentially has cast a condemnation blight over all the farmland in Brookhaven without any forethought whatsoever. There record also is completely devoid of any explanation concerning who or what will farm this land in perpetuity. There are no studies concerning the potential environmental impact of irrigation and pesticides. There are also no particular findings in the record below that the condemnation of some or all of Aspen's property is necessary in order to achieve the Town's overall goals whatever they may be.

The Town did not explore any of this in the proceedings below and there is no plan let alone a "carefully considered" development plan to support this condemnation. This is in stark contrast to the detailed studies and plans required by this Court in *Kelo*.

C. The Town's Condemnation Is a Pre-Text for Improperly Bestowing Benefits on Private Individuals

In *Kelo*, this Court made clear that the government cannot "take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Kelo*, *supra*, 545 U.S. at 478. Justice Kennedy, in his concurring opinion, emphasized that where courts are "confronted with a plausible accusation of impermissible favoritism to private parties," courts "should treat the objection as a serious one and review the record to see if it has merit," and that courts must "strike . . . down" takings that create "only incidental or pretextual public benefits." *Id.* at 491.

In the proceedings below the Town argued that the record is devoid of any contract, lease or other agreement between the Town and any other private party with regard to the subject property. That is precisely the point. The Town has not created a plan for the property so that it can avoid judicial scrutiny of any such plan.

The Town insists that the seizure of Mr. Kaywood's land will preserve farm space – ignoring apparently that for the land to be farm space, it must be farmed. By who, or how, the Town never revealed. The very fact that the Town has withheld information as to the manner in which the property is to be farmed can only be considered a deliberate attempt to avoid defending what ultimately will be a one-to-one transfer of property.

The Town also claims that the condemnation is necessary "to ensure the retention of scenic vistas" and "to protect the bucolic and rural characteristics of the subject property" and "adjoining properties." App. 30. This is code-speak for nothing less than condemnation to increase adjacent home values – a patently unconstitutional goal. The preservation of scenic vistas for a select group of residents (Mr. Kaywood's immediate neighbors) is not a valid public purpose or use. This condemnation is an abuse of municipal discretion for the direct benefit of Mr. Kennedy and Mr. Kaywood's neighbors.

The notion that the Town is taking land from Mr. Kaywood to satisfy the whims of Mr. Kennedy who wants to continuing farming the property and Mr. Kaywood's neighbors who want to protect their views is staggering and threatens an unprecedented expansion of eminent domain. It will encourage politically connected citizens to co-opt the powers of eminent domain in order to bring "as of right" development to a stand still and increase their own property values. This is precisely why *Kelo* requires a comprehensive economic development plan where property is transferred from one private individual to another.

In *Kelo*, this Court expressly noted that a one-to-one transfer of property, executed outside the confines of an integrated development plan, was not presented, and would indeed "raise the suspicion that a private purpose was afoot." *Kelo, supra,* at 545 U.S. at 487.

Because there is no rational development plan in connection with the taking of Aspen's property, Aspen essentially faces the equivalent of a one-to one taking here, albeit in two stages. Despite its dissembling, the Town essentially plans to take Aspen's land and give it to a private individual willing to farm the land. Although the Town carefully avoids admitting the existence or identity of that individual on the record, it is nonetheless obvious from the record that the individual to receive this benefit will be John Kennedy.

Mr. Kennedy was the only farmer who spoke at the condemnation hearing. He urged the Town to condemn the property so that he could continue to farm it. Furthermore, while the Town has not expressly admitted on the record its intent to sell or lease the land to Mr. Kennedy, Mr. Kennedy already farms the land to the East and the West of Aspen's property. Even more significantly Aspen was involved in a contentious legal battle with Mr. Kennedy concerning his claimed right to continue farming the property.

The Supreme Court of the United States has made clear that, in cases where an owner of private property claims that a governmental entity is unconstitutionally taking the property for a nonpublic use, the property owner's claim is entitled to careful consideration and investigation by a trial court. Justice Kennedy emphasized that the defendant in *Kelo* "[c]omplied with the elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes." *Id.* at 491 (Kennedy, J. concurring). In particular, in *Kelo*, "the trial court conducted a careful and extensive inquiry into 'whether, in fact, the development plan is of primary benefit to . . . the developer, and private business . . . , and in that regard, only incidental benefit to the city." *Id.* at 491 (Kennedy, J., concurring) (citation omitted).

The need for a carefully considered economic plan is particularly important in New York because New York's EDPL does not provide any of these procedural protections and forecloses any serious scrutiny that the involved municipal body is taking property "under the mere pretext of a public purpose, when its actual purpose [is] to bestow a private benefit." *Id.* at 478.

Under §§ 201–204 of the EDPL, the condemnor itself – here, the Town Board – conducted a "hearing" and decided for itself whether the taking is for a "public use." Under the EDPL, the Town Supervisor and the Board served, in effect, as judge and jury on the question of whether their stated purpose is, in fact, pretextual. Parties adversely affected by this proposed taking had no right under the EDPL to cross-examine the government officials or private interests that will benefit from this condemnation, or to obtain a de novo determination by a neutral adjudicator. Moreover, in contrast to the situation in *Kelo*, there was no trial court at all – much less any opportunity for a "careful and extensive inquiry" into the critical issue of public use. Although EDPL § 207 provides that the Appellate Division can review the condemnor's findings of "public use," the Appellate Division's review is limited to the virtually empty factual record made by the condemnor pursuant to the condemnor's own EDPL hearing. There is no factual record of the "mere pretexts of a public purpose" because there was no forum for petitioner to cross-examine the proponents of the condemnation or otherwise challenge their claimed assertion that there is a public purpose to their action, or create an appropriate factual record on the public use issue.

It is therefore critical that the Town create a "carefully considered" plan because that will provide the only basis to challenge the condemnation. The Town in this case essentially had three options when it decided to pursue the condemnation of Aspen's property:

- Option No. 1: Create a plan which arguably passes Constitutional muster (*e.g.*, A plan which provides that Town employees will farm the property and that the land will be open to the public).

- Option No. 2: Create a plan which would not pass Constitutional muster (*e.g.*, A plan which leases the property to a private farmer, John Kennedy, for $1 a year for twenty years – a windfall to Mr. Kennedy).

- Option No. 3: Don't create a plan.

The Town chose Option No. 3 which forecloses any close scrutiny of whether the purported public benefits of this taking are outweighed by the private benefits. The Court of Appeals improperly held that the Town's lack of a plan should be excused because the condemnation was executed pursuant to a generally applicable legislatively-enacted public policy in favor of farmland preservation. That is not the standard which this Court required in *Kelo* and sets a dangerous precedent for future condemnation in New York and elsewhere.

II. Certiorari Should Be Granted to Reverse the Continued Erosion of the Substantive Rights Guaranteed by the Takings Clause of the Fifth Amendment to the United States Constitution.

This Court's decision in *Kelo v. City of New London* is a landmark decision in takings jurisprudence which has emboldened local municipalities across the country to pursue condemnation in the name of economic development. The New York Court of Appeals has now adopted a new "public policy" standard which threatens to further erode the substantive rights guaranteed by the Takings Clause of the Fifth Amendment to the United States Constitution.

Justice O'Connor, in her dissenting opinion in *Kelo*, quoted Justice Chase, who, over two centuries ago, wrote:

> An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority . . . . A few instances will suffice to explain what I mean . . . . [A] law that takes property from A. and give it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.

Calder v. Bull, 3 Dall. 386, 388, 1 L.Ed. 648 (1798).

Justice O'Connor lamented that in light of the majority's decision in *Kelo* the "specter of condemnation hangs over all property" and there is nothing "to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." *Kelo, supra,* 545 U.S. at 503. Justice O'Conner also warned that:

> If legislative prognostications about the secondary public benefits of a new use can legitimate a taking there is nothing in the Court's rule or in Justice KENNEDY's gloss on that rule to prohibit property transfers generated with less care, that are less comprehensive, that happen to result from less elaborate process, whose only projected advantage is the incidence of higher taxes, or that hope to transform an already prosperous city into an even more prosperous one.

Id.

Justice O'Connor's fears have come true in this case. The Town condemned Aspen's property on a bare bones record without creating any plan let alone a "carefully considered" plan, and relied instead on legislative prognostications about the general benefits of farm land preservation - not specifically addressed to the taking at hand. At the same time the Town has failed and/or refused to identify who will ultimately receive the benefit of this property foreclosing any meaningful judicial scrutiny concerning whether the purported public purposes of the condemnation are outweighed by the private benefits.

The Town of Brookhaven has gone too far with too little and the Court of Appeals improperly excused the Town's failure to create a "carefully considered" plan by creating a new "public policy" standard. This Court should reject this or any other standard which does not satisfy the strict constitutional requirements set forth in *Kelo*.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS OF NEW YORK DECIDED FEBRUARY 17, 2009

COURT OF APPEALS OF NEW YORK

In the Matter of Aspen Creek Estates, Ltd.,

Appellant,

v.

Town of Brookhaven et al.,

Respondents.

Argued January 14, 2009
Decided February 17, 2009

OPINION OF THE COURT

Memorandum.

The judgment of the Appellate Division should be affirmed, with costs. The certified question should not be answered upon the ground that it is unnecessary.

Petitioner contends that the United States Supreme Court's decision in *Kelo v. New London*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 [2005], which dealt with takings for purposes of economic development, requires a preexisting farmland preservation plan to justify the taking of its property as a public use within the meaning of the Fifth Amendment (*see* U.S. Const.Amend. V ["nor shall private property be taken for public use, without just compensation"]). We need not, and do not, reach the issue whether petitioner's interpretation of *Kelo* is correct, since the challenged taking was constitutionally proper even assuming that a preexisting farmland preservation plan was necessary. Petitioner's property was taken pursuant to a legislatively-declared public policy in favor of farmland preservation and as part of the Town of Brookhaven's master plans endorsing farmland preservation. In furtherance of these plans, Town voters passed three bond acts providing $130 million to acquire development rights or fee interests in undeveloped land in the Town; among the areas specifically designated for preservation was the 500-acre tract of farmland in which petitioner's parcel is located.

In short, the public benefits of the taking in this case were not incidental or pretextual in comparison with benefits to particular, favored private entities; petitioner's remaining arguments likewise lack merit. Finally, the parties have not argued, and we do not decide, whether the New York Constitution (*see* N.Y. Const. art I, § 7[a]) imposes a more stringent standard for takings than does the Fifth Amendment as interpreted by *Kelo*.

Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur in memorandum; Chief Judge Lippman taking no part.

Judgment affirmed, etc.

APPENDIX B — DECISION AND ORDER ON MOTION OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT DATED MARCH 28, 2008

ROBERT A. SPOLZINO, J.P.
STEVEN W. FISHER
DAVID S. RITTER
ROBERT A. LIFSON, JJ.

2006-03815

In the Matter of Aspen Creek Estates, Ltd.,

petitioner,

v

Town of Brookhaven, et al.,

respondents.

DECISION & ORDER ON MOTION

Motion by the petitioner for leave to reargue a proceeding pursuant to EDPL 207 to review a determination of the Town of Brookhaven dated March 21, 2006, made after a public hearing, to acquire the petitioner's property by condemnation, which was determined by opinion and judgment of this court dated December 4, 2007, or, in the alternative, for leave to appeal to the Court of Appeals from the opinion and judgment of this court.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the branch of the motion which is for leave to reargue is denied; and it is further,

ORDERED that the branch of the motion which is for leave to appeal to the Court of Appeals is granted, and the following question is certified to the Court of Appeals: Was the opinion and judgment of this court dated December 4, 2007, properly made?

Questions of law have arisen, which, in our opinion, ought to be reviewed by the Court of Appeals (*see* CPLR 5713).

SPOLZINO, J.P., FISHER, RITTER and LIFSON, JJ., concur.

ENTER:

S/ James Edward Pelzer
James Edward Pelzer
Clerk of the Court

March 28, 2008

APPENDIX C — OPINION OF THE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, NEW YORK DATED DECEMBER 4, 2007

SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, NEW YORK

In the Matter of ASPEN CREEK ESTATES, LTD.,

Petitioner,

v.

TOWN OF BROOKHAVEN, et al.,

Respondents.

December 4, 2007

OPINION OF THE COURT

Krausman, J.

The subject of this condemnation proceeding is a 39-acre parcel of farmland (hereinafter the property) which the petitioner Aspen Creek Estates, Ltd. (hereinafter Aspen Creek), purchased for residential development. The property is located in a portion of the Town of Brookhaven known as the "Manorville Farmland Protection Area." The Manorville Farmland Protection Area is an approximately 500-acre working farm belt which has been described as "the largest and most contiguous belt of productive agricultural land" remaining in the Town. At issue in this proceeding is whether the Town's decision to exercise its power of eminent domain to condemn the property in order to preserve its use as farmland serves a legitimate public purpose, or is instead a pretext to improperly confer benefits upon private persons. Contrary to the conclusion reached by our dissenting colleague, we believe that the record fully supports the Town's decision to condemn the property for a public purpose as part of its continuing efforts to preserve the rural character of the Manorville Farmland Protection Area and ensure that the historical use of the land is not extinguished by development. Accordingly, we confirm the determination acquiring the property by condemnation.

On January 24, 2006, the Town Board of the Town of Brookhaven (hereinafter the Board) took the first step in the condemnation process by adopting a resolution expressing its intent to acquire the property and its development rights in order to ensure that it be "maintained for farming and not developed." In accordance with the requirements of the Eminent Domain Procedure Law, the resolution scheduled a public hearing on the proposed acquisition, and directed the Town Clerk to publish notice of the hearing in two local newspapers (*see* EDPL 201, 202).

At the ensuing public hearing conducted on March 7, 2006, Town representatives described the purpose of the condemnation and the Town's prior attempts to acquire the property through a negotiated sale.

Members of various civic associations, neighboring property owners, local residents, and Aspen Creek's president were then afforded an opportunity to express their views. According to testimony presented at the hearing, the subject property was continuously farmed for over a century. In the late 1800s the property was a hay farm, and in more recent years a variety of crops have been grown on the land, including strawberries, corn, potatoes, cauliflower, and string beans. One of the area residents attending the hearing noted that the property was particularly beautiful in the fall, when pumpkins and sunflowers were harvested. The farmhouse on the property predates 1858, and has been recommended for landmark designation by the Town's Historic District Advisory Committee. An adjacent landowner, John Kennedy, leased the subject property and farmed it for approximately 23 years, until it was sold to Aspen Creek and an action for ejectment was commenced to remove him from the property (*see Aspen Cr. Estates, Inc. v. Kennedy*, 32 A.D.3d 870, 823 N.Y.S.2d 78).

The hearing testimony further reveals that the Town's initial efforts to acquire the property began on January 14, 2003, when the Town's Open Space Environmental Bond Act Committee approved the purchase of the development rights to the property from its former owners. However, at that time Aspen Creek's president, Anthony Kaywood, was already in the process of negotiating the purchase of the property. On February 6, 2003, when Kaywood appeared before a Manorville civic group to discuss a proposal to subdivide and build 19 houses on the property, he was advised "that the Town was interested in preserving the entire area and that that parcel was a priority." Although the Town entered into negotiations with the former owners of the property, Aspen Creek outbid the Town, and on March 9, 2004, it purchased the property for $1.4 million. Shortly thereafter, the Town entered into negotiations to purchase the development rights to the property from Aspen Creek. After Aspen Creek rejected the Town's initial offer as too low, the Town increased its offer to $3.52 million based upon the highest property appraisal it had received. In January 2006 the Town increased its offer for the property's development rights to $4.004 million. In addition, according to the Town Attorney, in an effort to reach a compromise, the parties discussed allowing three lots to be developed so that Kaywood and his two partners could build houses for themselves on the property. After these attempts to negotiate a purchase of the property's development rights proved unsuccessful, the Town began the process of acquiring ownership of the land and development rights through the exercise of eminent domain.

Testimony was also presented at the hearing which demonstrates that the Town's efforts to preserve Manorville's farming heritage was not limited to the acquisition of the subject property. At the time of the hearing, the Town, in partnership with the County of Suffolk, had acquired the development rights to four farms in the Manorville protection area, including the Hoschler Farm located directly to the east of the property. The Town and County shared in the $8,270,000 cost of acquiring the development rights to these four farms, thus preserving approximately 112 acres of farmland.

Shortly after the hearing, the Town's Division of Environmental Protection completed an Environmental Assessment Form (hereinafter EAF) determining that the proposed condemnation was an unlisted action and would not have a significant impact on the environment, thereby warranting issuance of a negative declaration pursuant to the State Environmental Quality Review Act (hereinafter SEQRA).

At a meeting on March 21, 2006, the Board voted to acquire title to the property and its development rights through the exercise of eminent domain, and adopted the Division of Environmental Protection's recommendation to issue a negative declaration. In approving the condemnation, the Board declared that the property was being acquired, among other things, to preserve open space and agricultural resources, protect and promote continuation of agriculture in the Town, ensure the continued sale of fresh, locally grown produce, and prevent conflicts between residential homeowners and adjacent farmers. The Board also found that preserving the property would "have a positive impact on the environment and surrounding community by ensuring the protection of scenic vistas and the rural character of the area, and helping to achieve the protection of the 500-acre Manorville Farm Protection Area, a high priority preservation target."

Aspen Creek thereafter commenced this proceeding to review the Town's determination, alleging, inter alia, that the Town had failed to comply with EDPL requirements that a property owner be given notice of the purpose of the condemnation and a reasonable opportunity to testify and present evidence at the hearing, and that application of the EDPL was unconstitutional as applied to Aspen Creek because it did not afford it an opportunity to cross examine the proponents of the condemnation. In addition, Aspen Creek claimed that the Board had failed to fulfill its obligations under SEQRA in issuing a negative declaration concluding that the condemnation would have no significant environmental impact. Aspen Creek further claimed that the Town's determination violated the EDPL because its true intent was to take the subject property to lease to private farmers.

The principal purpose of EDPL article 2 is to ensure that a governmental entity does not acquire property without having made a reasoned determination that the condemnation will serve a valid public purpose (*see* EDPL 201; *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417-418, 503 N.Y.S.2d 298, 494 N.E.2d 429; *Matter of Woodfield Equities LLC v. Incorporated Vil. of Patchogue*, 28 A.D.3d 488, 489, 813 N.Y.S.2d 184). Although a party aggrieved by the condemnor's determination and findings may seek judicial review, the scope of that review is limited by EDPL 207 to: (1) whether the proceeding was in conformity with the federal and state constitutions, (2) whether the proposed acquisition is within the condemnor's statutory jurisdiction or authority, (3) whether the condemnor's determination and findings were in accordance with the procedures set forth in EDPL article 2 and SEQRA, and (4) whether a public use, benefit, or purpose will be served by the proposed acquisition. "If an adequate basis for a determination is shown and the objector cannot show that the determination was without foundation, the agency's determination should be confirmed" (*Matter of Waldo's, Inc. v. Village of Johnson City*, 74 N.Y.2d 718, 720, 544 N.Y.S.2d 809, 543 N.E.2d 74; *see Matter of Butler v. Onondaga County Legislature*, 39 A.D.3d 1271, 1272, 833 N.Y.S.2d 829; *Matter of Kaufmann's Carousel v. City of Syracuse Indus. Dev. Agency*, 301 A.D.2d 292, 300, 750 N.Y.S.2d 212). A property owner seeking to challenge a municipality's finding that a proposed condemnation will further a public use has the burden of establishing that the determination does not rationally relate to a conceivable public purpose (*see Matter of Waldo's, Inc. v. Village of Johnson City*, 74 N.Y.2d at 720, 544 N.Y.S.2d 809, 543 N.E.2d 74; *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d at 420-421, 503 N.Y.S.2d 298, 494 N.E.2d 429).

Turning first to Aspen Creek's procedural challenges, we reject its contention that it did not receive adequate notice of the public hearing, and that its president Anthony Kaywood was denied a reasonable opportunity to testify and present evidence. EDPL 202(a), which requires the condemnor to state the purpose of the hearing in its notice, does not obligate it to describe every aspect of the project and its implementation (*see Matter of Rocky Point Realty, LLC v. Town of Brookhaven*, 36 A.D.3d 708, 828 N.Y.S.2d 197; *Matter of Kaufmann's Carousel v. City of Syracuse Indus. Dev. Agency*, 301 A.D.2d at 292, 750 N.Y.S.2d 212). Here, the published notice stating that the Town sought to acquire the property and development rights to ensure its continuation as farmland was sufficient to satisfy the requirements of EDPL 202(a). Furthermore, although the separate notice sent to Aspen Creek was less detailed, the record demonstrates that Kaywood was fully aware of the Town's stated purpose for seeking condemnation, and thus had an opportunity to prepare for the hearing. Moreover, while the Board limited speaking time at the hearing because of the large number of people who wished to be heard, the record reflects that Kaywood was given considerably more time to present his views than other speakers. There is also no evidence that Aspen Creek was denied an opportunity to supplement Kaywood's presentation by submitting written materials after the hearing.

We also find no merit to Aspen Creek's argument that the EDPL is unconstitutional as applied in this case because the statute does not give parties adversely affected by a proposed taking the right to an adversarial hearing at which government officials can be cross examined. The procedures outlined in the EDPL have been held to satisfy the due process requirements of the Federal and State Constitutions (*see Matter of Waldo's Inc. v. Village of Johnson City*, 141 A.D.2d 194, 534 N.Y.S.2d 723, *affd.* 74 N.Y.2d 718, 544 N.Y.S.2d 809, 543 N.E.2d 74; *Village Auto Body Works v. Incorporated*

Vil. of Westbury, 90 A.D.2d 502, 503, 454 N.Y.S.2d 741; *First Broadcasting Corp. v. City of Syracuse*, 78 A.D.2d 490, 494-496, 435 N.Y.S.2d 194), and Aspen Creek's allegations that the proponents of the condemnation were, in essence, biased and/or acting in bad faith does not warrant judicially transforming the public hearing required by statute into a full-fledged adversarial proceeding (*see Matter of Waldo's, Inc. v. Village of Johnson City*, 74 N.Y.2d at 722, 544 N.Y.S.2d 809, 543 N.E.2d 74). Indeed, as the Court of Appeals observed in rejecting a similar argument in *Matter of Waldo's, Inc. v. Village of Johnson City*, 74 N.Y.2d at 719, 544 N.Y.S.2d 809, 543 N.E.2d 74, "at the public hearing petitioner was free to present any evidence to undermine the bona fides of the legislative body's decision-making process. Having completely failed to do so, petitioner can not now be heard to complain."

Furthermore, the petitioner's contention that the Town failed to comply with the requirements of SEQRA in adopting its findings and determination is without merit. SEQRA requires that agencies "minimize or avoid adverse environmental effects" when considering proposed actions (ECL 8-0109[1]; *see* 6 NYCRR 617.7). In the EAF prepared in connection with the condemnation, no adverse environmental impacts were identified, and Aspen Creek has failed to assert any significant potential for environmental harm that might result from condemnation. Although Aspen Creek notes that the property is located in a Compatible Growth Area of the Central Pine Barrens Region, in considering the potential environmental impact of the proposed condemnation it cannot be overlooked that the Town's purpose in acquiring the property is to continue the farming use that has been in place for generations. Thus, as noted by the Town in its negative declaration, the acquisition will actually have a beneficial impact on the environment. Under these circumstances, the issuance of a negative declaration was appropriate and the preparation of an environmental impact statement was unnecessary (*see* 6 NYCRR 617.7[a][2]; *Matter of Wells v. Board of Trustees of Inc. Vil. of Northport*, 40 A.D.3d 652, 835 N.Y.S.2d 432; *Matter of Rocky Point Realty, LLC v. Town of Brookhaven*, 36 A.D.3d at 708, 828 N.Y.S.2d 197; *Matter of Woodfield Equities LLC v. Incorporated Vil. of Patchogue*, 28 A.D.3d at 488, 813 N.Y.S.2d 184; *Matter of McCarthy v. Town of Smithtown*, 19 A.D.3d 695, 797 N.Y.S.2d 555).

Turning next to the issue of whether the condemnation will serve a public purpose, we believe that it is clear, as our dissenting colleague concedes, that the Town's stated reasons for acquiring the property—preserving farmland and maintaining open space and scenic vistas—are all legitimate public purposes. "What qualifies as a 'public purpose' or 'public use' is broadly defined as encompassing virtually any project that may confer upon the public a benefit, utility, or advantage" (*Matter of 49 WB, LLC v. Village of Haverstraw*, 44 A.D.3d 226, 235, 839 N.Y.S.2d 127). These terms encompass "any use which contributes to the health, safety, general welfare, convenience or prosperity of the community" (*Greenwich Assoc. v. Metropolitan Transp. Auth.*, 152 A.D.2d 216, 221, 548 N.Y.S.2d 190; *see Matter* *of Rocky Point Realty, LLC v. Town of Brookhaven*, 36 A.D.3d at 708, 828 N.Y.S.2d 197). Clearly, the preservation of farmland confers a benefit upon the public, since it enables residents of the Town to enjoy locally grown produce and scenic views. Indeed, the proposed condemnation had the overwhelming support of almost all of the area residents and civic association members who spoke at the hearing. Many of these individuals spoke eloquently about the beauty of the property, the area's "pristine landscape," and the desirability of maintaining Manorville's rich farming heritage for future generations. Another speaker pointed out, in a letter read at the hearing, that "land suitable for farming is an irreplaceable natural resource with soil and topographic characteristics that have been enhanced by generations of agricultural use. When such land is converted to residential or other more developed uses that do not require those special characteristics, a critical community resource is permanently lost to the citizens of the area and the county at large."

Furthermore, the preservation of farmland is in keeping with the declared public policy of this state to "promote, foster, and encourage the agricultural industry" (Agriculture and Markets Law § 3), and to acquire interests and rights in real property for the preservation of open space and enhancement of natural resources, including agricultural lands (*see* General Municipal Law § 247[1]). So important is the protection of open spaces and natural resources to residents of the Town that in 2002 they overwhelmingly voted for a bond act to provide $20 million for the preservation of open space and environmentally important lands. Town residents subsequently approved the Clean Water Open Space Bond Act of 2004, authorizing the issuance of up to $100 million in bonds "to finance the acquisition of interests or rights in real property in the Town for the preservation of open space, farmland and wildlife habitats."

Despite the fact that preservation of farmland undoubtedly provides a benefit to the public, Aspen Creek maintains that the condemnation of its property does not pass constitutional muster because the true purpose of the taking is to bestow a private benefit on certain individuals. In this regard, Aspen Creek asserts that the Town is trying to take its private property to allow a private individual other than the present owner to use it as a farm, and/or to block further development in order to increase the value and appeal of already existing homes. To the extent that Aspen Creek appears to be questioning the motives of members of the Board and the many citizens who spoke in favor of the proposed condemnation at the public hearing, its allegations find no factual support in the record and are insufficient to demonstrate bad faith (*see Matter of 49 WB, LLC v. Village of Haverstraw*, 44 A.D.3d at 238-239, 839 N.Y.S.2d 127; *Matter of Woodfield Equities LLC v. Incorporated Vil. of Patchogue*, 28 A.D.3d at 488, 813 N.Y.S.2d 184). Moreover, the mere fact that condemnation will provide incidental benefits to private individuals does not invalidate the condemnor's determination as long as the public purpose is dominant (*see Matter of Waldo's Inc. v. Village of Johnson City*, 74 N.Y.2d at 721, 544 N.Y.S.2d 809, 543 N.E.2d 74; *Matter of 49 WB, LLC v. Village of Haverstraw*, 44 A.D.3d at 238, 839 N.Y.S.2d 127; *Matter of Glen Cove Community Dev. Agency*, 259 A.D.2d 750, 712 N.Y.S.2d 553).

Recently, in *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439, the United States Supreme Court upheld the condemnation of a number of parcels which were located in a 90-acre area that had been targeted for development "to revitalize an economically distressed city." The development agent of the City of New London, a nonprofit entity, proposed leasing some of the parcels to private developers in exchange for their agreement to develop the land according to the terms of the development plan. In reaching its decision to uphold condemnation, the United States Supreme Court acknowledged that the City was forbidden from taking the petitioners' land for the purpose of conferring a private benefit on a particular private party, or taking the property "under the mere pretext of public purpose, when its actual purpose was to bestow a private benefit." However, the United States Supreme Court concluded that the taking of the petitioners' properties pursuant to a "carefully considered development" plan which the City believed would provide appreciable benefits to the community satisfied the public use requirement of the Fifth Amendment. The United States Supreme Court also rejected the petitioners' argument that using eminent domain for economic development impermissibly blurs the boundary between public and private takings, observing in this regard that "the government's pursuit of a public purpose will often benefit individual private parties" (*id.* at 485, 125 S.Ct. 2655).

Aspen Creek relies upon *Kelo* to argue that the condemnation of its property either serves no public benefit, or is a pretext to benefit private individuals, because it was not part of a carefully considered development plan. However, in contrast to *Kelo*, this matter does not involve a proposed taking for economic development, which arguably might need to be justified by a formalized development plan. Rather, as the Town points out, the purpose of the condemnation of Aspen Creek's property is the preservation of farmland, and the concomitant preservation of open space and scenic vistas. Neither *Kelo*, nor this Court's recent decision in *Matter of 49 WB, LLC v. Village of Haverstraw*, upon which our dissenting colleague also relies, requires that a proposed condemnation for the preservation of farmland be part of a comprehensive development plan.

In any event, while it does not appear from the record that the precise boundaries of the Manorville Farmland Protection Area have been formally defined by the Town, it is clear from the comments made by various speakers at the hearing that the desirability of preserving farmland in Manorville has indeed been recognized by civic associations and public officials. A plan prepared by the Manorville Taxpayers Association in 1993 set preservation of the remaining farms in the hamlet as a goal, and stated that the "area of preservation would include the 300+ agricultural farmland acres between the north side of South Street and the south side of the [Long Island] Expressway," as well as farmlands bordering Sunrise Highway. Furthermore, the Town's Director of Environmental Protection explained at the hearing that what was referred to as the Manorville Farm Protection Area was approximately 500 contiguous acres of productive farmland bracketed by the Long Island Expressway and South Street. Moreover, it is difficult to perceive how the existence of a genuine desire to preserve the land lying within this working farm belt can be gainsaid in light of evidence at the hearing that the Town and County had recently expended over $8 million to acquire the development rights to four farms in the Manorville protection area, including a farm located directly to the east of the property.

The fact that the Town entertained the possibility of allowing the three principals of Aspen Creek to build individual residences on the property in an effort to achieve a negotiated sale does not cast doubt on the "true motivation" of Town officials. As the dissent recognizes, it is obvious that a voluntarily negotiated sale is preferable to the exercise of eminent domain, and the Town's willingness to consider this very limited residential development on the property in an effort to achieve a compromise does not undercut the legitimacy of its farmland preservation goal. Although the dissent places great emphasis on the Town's initial failure to match Aspen Creek's $1.4 million offer for the property in 2003, and its subsequent willingness to increase its offer, it should be noted that the enactment of the 2004 bond act apparently placed a far greater amount of funds at the Town's disposal. It is also significant to note that the increase in the Town's offering price was based upon the appraised value of the property, and was not simply arbitrary.

Although the record is completely devoid of evidence pertaining to how the Town intends to use the property after the acquisition, the possibility that the Town may sell or lease the land to a farmer does not make the proposed condemnation a pretext for improperly conferring a private benefit. As noted, the land had been continuously farmed for more than a century before Aspen Creek purchased it for development purposes, with full knowledge that it had been targeted for preservation. Since allowing farming to continue on the property is fully consistent with the purpose of this condemnation, the fact that one or more individual farmers may benefit is merely incidental, and does not render the public benefit to be achieved by condemnation illusory. The record is also completely devoid of evidence to support Aspen Creek's theory that the proposed condemnation was motivated by a desire to increase the property value of existing homes in Manorville, and, in any event, any increase in property values would similarly be an incidental benefit.

Finally, we conclude that Aspen Creek has failed to sustain its burden of establishing that the taking is excessive. "[I]t is generally accepted that the condemnor has broad discretion in deciding what land is necessary to fulfill [the public] purpose" (*Matter of Rafferty v. Town of Colonie*, 300 A.D.2d 719, 723, 752 N.Y.S.2d 725; *see Matter* *of Butler v. Onondaga County Legislature*, 39 A.D.3d 1271, 833 N.Y.S.2d 829; *Matter of Stankevich v. Town of Southold*, 29 A.D.3d 810, 815 N.Y.S.2d 225; *Matter of Gyrodyne Co. of Am. Inc. v. State Univ. of N.Y. at Stony Brook*, 17 A.D.3d 675, 794 N.Y.S.2d 87). As pointed out at the hearing, the property lies within a large, contiguous tract of working farmland, and permitting any significant residential development defeats the Town's aim of preserving this entire area. Thus, the Town's determination that acquisition of the entire parcel was necessary to achieve the public purpose of the condemnation was rational, and there is no basis upon which to disturb it. Accordingly, the determination is confirmed, the petition is denied, and the proceeding is dismissed.

CRANE, J.P. and FISHER, J., concur.

LIFSON, J., dissents and votes to grant the petition and annul the determination with the following memorandum:

Aspen Creek Estates, Ltd. (hereinafter Aspen Creek or the petitioner) owned about 39.15 acres (hereinafter the property) located north of South Street and east of Wading River Road in the Town of Brookhaven. Aspen Creek acquired the property in 2004 for a price of about $1.4 million. According to the "Notice to property owners," the Town sought to acquire the property

> "[t]o preserve open space and agricultural resources; to preserve prime agriculture in

> the Town which is an important component of the local economy; to ensure the retention of scenic vistas; to protect the bucolic and rural character of the subject property, adjoining properties, and the Manorville Farm Protection Area; to ensure the continued sale of fresh, locally-grown produce; to prevent conflicts between residential homeowners and adjacent farmers; and to help ensure the preservation of the Manorville Farm Protection Area, a high priority preservation target which contains the largest contiguous belt of working farmland left in Brookhaven Town."

At the ensuing public hearing, testimony was heard as to the public necessity of acquiring the property and the Town's three-year attempt to acquire the property through a negotiated purchase. The last offer rejected by the petitioner included a proposed purchase price of $4.004 million, while allowing the retention of three building lots for development for the petitioner's principals as their own homes. The Town similarly had attempted to acquire the property from the prior owner but the petitioner had offered a higher price and, thereby, acquired the property.

In opposition, the petitioner presented proof which indicated that it had submitted no less than 30 development alternatives, all of which had been rejected by the Town. In one proposal, the petitioner submitted a plan which preserved two thirds of the property as farmland and confined development to the remaining one third of the property.

Based on this record, the Town issued a negative declaration under the State Environmental Quality Review Act (ECL art. 8 [hereinafter SEQRA]) and directed the Town Attorney to acquire the property by condemnation. That decision allegedly was based on the Town's perfunctory conclusion that the proposal was an unlisted action, did not involve any physical activity, and was not anticipated to have a significant impact on the environment, public health, or the character of the community and that the condemnation "will preserve and protect ecologically important land and farmland . . . and would thus have a beneficial effect on the environment."

The instant petition to annul the negative declaration under SEQRA and the respondents' determination condemning the property alleges that the Town acted in bad faith in condemning the property, doing so only to avoid having the Town Planning Board ordered to pass on subdivision of the property via an article 78 proceeding. The petition also alleges that the condemnation was effected in violation of the Constitutions of the United States and the State of New York, that the condemnation procedure was flawed, and that the condemnation was approved without proper environmental review. The respondents have denied the allegations of the petition.

For the reasons stated below, I believe the petition should be granted and the determination and findings of the Town of Brookhaven dated March 21, 2006, authorizing the condemnation of the subject parcel, should be annulled. At the outset, I concur with the majority's conclusion that the petitioner's procedural arguments are without merit. Similarly, I agree that the purported public purpose alleged to be advanced by the condemnation, to wit, the preservation of farmland, open spaces and scenic vistas would, if applied in good faith, advance a recognized public policy of the State of New York and the County of Suffolk (*see e.g.* General Municipal Law § 247; Agriculture & Markets Law § 3; Suffolk County Farmland Preservation Law [1974]; Suffolk County Agricultural Preservation Plan [2006]).

The guiding legal principles with respect to the exercise of the State's power of eminent domain were recently revisited in *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 and its progeny. As *Kelo* clearly states, the taking of one citizen's property for the purpose of conferring a private benefit on another citizen is violative of the Constitution of the United States and is therefore forbidden except where such benefit is merely incidental to some other bona fide public purpose expressed through a recognizable plan (*see Kelo v. City of New London*, 545 U.S. at 477, 125 S.Ct. 2655). *Kelo* also prohibits the utilization of a bona fide public purpose as a rationale or pretext for a taking designed to benefit private citizens (*see Kelo v. City of New London*, 545 U.S. at 478, 125 S.Ct. 2655). This Court has recently expanded the *Kelo* rationale to require careful scrutiny in determining whether the taking was pretextual, especially where the taking is for ephemeral purposes such as alleged economic development (*see 49 WB, LLC v. Village of Haverstraw*, 44 A.D.3d 226, 839 N.Y.S.2d 127).

In both *Kelo* and *49 WB, LLC*, the proposed taking was to advance economic development in an urbanized setting. In *Kelo*, the United States Supreme Court placed great weight on a record that clearly demonstrated that the taking was pursuant to a comprehensive master development plan. In *49 WB, LLC*, this Court determined that, while the asserted purpose of the taking could be rationalized as advancing a recognized public policy (i.e. economic development), in actuality the taking was done primarily and illegally to advance the economic needs of a particular developer to satisfy that developer's obligation to provide a threshold amount of affordable housing imposed by an earlier contract with the municipality. In the present case, the proposed taking occurs in a rural setting where the avowed public purpose is, depending on one's point of view, the prevention of development of vacant land and/or the preservation of dwindling acres of farmland. Notwithstanding that this taking is the polar opposite confronting this Court in *49 WB, LLC v. Village of Haverstraw*, applying the same rationale used therein to this record leads me to the inescapable conclusion that this taking was pretextual and is, therefore, forbidden by the Federal Constitution (*see Kelo v. City of New London*, 545 U.S. at 469, 125 S.Ct. 2655).

I conclude that the rationale for the proposed taking is pretextual for the following reasons. First, while there are several references to a Manorville Farmland Protection Area in the record, no Town ordinance or formalized plan for the alleged preservation of the area in which the property is located is set forth. Instead, the respondents rely on vague references to such designation as early as 1993 without being able to explain what the detailed plan was or is. The fact that the Town's Open Space Committee approved the "protection" of the area in 2003 or that bond proceeds were used to acquire parcels of lands or development rights within such designated area is not proof of a coherent plan for preservation, or that the public acquisition of the entire tract (i.e. the property) and its use as farmland is essential to the furtherance of such an alleged plan.

Second, assuming that a valid plan existed for the *acquisition* of the property, the Town's actions on this matter seem at great variance with what that plan purports to be. The Town allegedly endeavored to acquire the land for farmland preservation purposes in 2003, apparently while it was still utilized for agricultural purposes, yet failed to match Aspen Creek's offer of $1.4 million. As the New York State Farm Bureau's Director of Public Policy indicated at the hearing, acquisition of development rights of an existing farm via arms-length negotiations is preferable to condemnation of the property in toto and is the general norm for farmland preservation. That view was supported by the Long Island Builders Association.

Third, the willingness of the Town to increase its offer nearly 300% in less than two years, and the concomitant loss of millions of dollars for further acquisitions of property or development rights within the alleged targeted preservation area, raises questions as to the motivations of those involved as well as the propriety of the transactions (*see e.g. State of New York v. Grecco*, 43 A.D.3d 397, 840 N.Y.S.2d 149; *State of New York v. Grecco*, 21 A.D.3d 470, 800 N.Y.S.2d 214). Fourth, that circumstance is further magnified by the fact that testimony was offered at the hearing that any residential development within the Manorville Farmland Protection Area was incompatible with any agricultural use. Yet, contrary to its alleged public purpose, the Town had indicated a willingness to allow residential development of some of the property for homes of the principals of Aspen Creek. The difference between that plan and one of the plans proposed by the petitioner, encompassing the preservation of about two thirds of the property as open space or farmland (without any cost to the public), is merely a matter of degree. However, the loss of nearly $4 million for the potential preservation of the remainder of the parcels within the alleged Manorville Farmland Protection Area is inexplicable and calls into question the true motivation of the respondents.

Lastly, the fact that the property was taken while it was not in agricultural use is of no small moment. That circumstance clearly shows that the alleged "preservation" of the agricultural use of the parcel can no longer be accomplished without the rental of the property to a "farmer." That "farmer," whether the previous tenant, as asserted in petitioner's brief (and the pool of potential farmers appears to be extremely limited), or another, would be the sole beneficiary of the economic utilization of the property. Thus, I conclude that the potential benefit to the public is so disproportionate and ephemeral when compared to the actual benefit conferred on the tenant that the proposed taking cannot be justified as an efficient advancement of the stated public policy.

Because I believe that close scrutiny of the rationale offered by the Town offers illusory benefits to the public and is a mere pretext for an impermissible taking (*see 49 WB, LLC v. Village of Haverstraw*, 44 A.D.3d 226, 839 N.Y.S.2d 127), I respectfully dissent.

ADJUDGED that the determination is confirmed, with costs, the petition is denied, and the proceeding is dismissed.

APPENDIX D — RESOLUTION OF MARCH 21, 2006 ADOPTING THE FINDINGS AND DETERMINATION OF THE TOWN BOARD [140-141]

RESOLUTION OF MARCH 21, 2006 ADOPTING THE FINDINGS AND DETERMINATION OF THE TOWN BOARD [140-141]

RESOLUTION NO. 8A

MARCH 21, 2006

ADOPTING THE FINDINGS AND DETERMINATION OF THE TOWN BOARD TO CONDEMN PROPERTY TO INSURE IT IS USED AS FARMLAND AND TO ACQUIRE DEVELOPMENT RIGHTS – MANORVILLE

WHEREAS, a hearing has heretofore been held on March 7, 2006, by the Town Board of the Town of Brookhaven, in Suffolk County; New York, with regard to the proposed acquisition of real property situated at Manorville, Town of Brookhaven, County of Suffolk, New York, and

WHEREAS, this property is more fully described as Suffolk County Tax Map No. 0200-508.00-01.00-015.001, and

Appendix D

WHEREAS, pursuant to Section 204 of the Eminent Domain Procedure Law, the Town Board has made its findings and determination with regard to the proposed acquisition and public project;

NOW, THEREFORE, BE IT RESOLVED by the Town Board of the Town of Brookhaven, in Suffolk County, N.Y. as follows:

That the following constitutes the findings and determination of the Town Board of the Town of Brookhaven and is hereby adopted as such:

1. The purpose of the acquisition is: to preserve open space and agricultural resources; to preserve prime agricultural soils; to help protect and promote continuation of agriculture in the Town which is an important component of the local economy; to ensure the retention of scenic vistas; to protect the bucolic and rural character of the subject property, adjoining properties, and the Manorville Farm Protection Area; to ensure the continued sale of fresh, locally-grown produce; to prevent conflicts between residential homeowners and adjacent farmers; and to help ensure the preservation of the Manorville Farm Protection Area, a high priority preservation target which contains the largest contiguous belt of working farmland left in Brookhaven Town.

2. The property is located on the north side of South Street in Manorville approximately 600 feet east of the intersection of South Street and Wading River Road.

3. The action by the Town of Brookhaven, through preserving the property, will have a positive impact on the environment and surrounding community by ensuring the protection of scenic vistas and the rural character of the area, and helping to achieve the protection of the 500-acre Manorville Farm Protection Area; a high priority preservation target of the Town of Brookhaven.

4. In the Manorville Farmland Protection Area (hereinafter MFPA), the Town of Brookhaven and Suffolk County have made significant prior public investments to acquire farmland development rights, including four other nearby farm properties, in an effort to preserve the largest contiguous block of farmland in the Town. The Town of Brookhaven Open Space Environmental Bond Act Advisory Committee has recommended the preservation of the property and, on 4/15/03, approved the protection of all the properties that collectively comprise the MFPA. It is also important to note the property has been recommended for preservation pursuant to the Town's Community Preservation Fund Project Plan. The parcel is situated within the Compatible Growth Area of the Central Pine Barrens.

5. The Town of Brookhaven and Suffolk County have made significant progress in protecting farmland and other properties in the MFPA. To date the County and Town have preserved approximately 112 acres of farmland involving four properties: Zeh Farm, 19.95 acres; Hoshyla Farm, 45.63 acres, immediately east of

the subject property; Dosiak Farm, 24.7 acres; and the Gentry Horse Farm, 23.10 acres. The collective cost for these purchases has been $8,270,000.00 with the Town expending $3,905,000.00. The County already owns a 21 acre wooded site to the north of the subject property and the Town recently preserved a 4.7 acre wooded site in the western edge of the MFPA (MKM Development Corp) at a cost of $450,000. Additionally, the County and Town are currently appraising four other properties totaling about 90 acres.

6. The Town Attorney of the Town of Brookhaven is hereby directed to proceed to acquire title to the aforementioned property through the exercise of Eminent Domain. The cost of the acquisition of the development rights of the real property, shall be paid from Fund HRCW 1420 3080 and the cost of the acquisition of the fee title to the land including the amount paid for said acquisition as well as any and all expenses relative thereto, shall be paid from the General Reserve Fund for land acquisitions.

OPPOSITION BRIEF

(2)

No. 08-1444

Supreme Court, U.S.
FILED
JUN 17 2009
OFFICE OF THE CLERK

IN THE

United States Supreme Court

In the Matter of
ASPEN CREEK ESTATES, LTD.,

Petitioner,

against

TOWN OF BROOKHAVEN and
THE TOWN BOARD OF THE TOWN OF BROOKHAVEN,

Respondents.

*On Petition for a Writ of Certiorari to the
New York State Court of Appeals*

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Courts below[1] properly conclude that the proposed taking by the Town of Brookhaven complied with the Fifth Amendment of the United States Constitution where the land is to be condemned in order to preserve farmland and open space in an area designated as "the largest and most contiguous belt of productive agricultural land" in an area of the Town of Brookhaven known for the farming and rural character of the community?[2]

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[1] The term "courts below" refers to the Supreme Court of the State of New York Appellate Division, Second Department, and the New York State Court of Appeals.

[2] In accordance with Rule 15.2 of this court, the Respondent Town asserts that the Question Presented of Petitioner mischaracterizes the holding of the New York Court of Appeals below, as further discussed in the Respondents' Brief in Opposition.

DISCLOSURE STATEMENT

The TOWN OF BROOKHAVEN and THE TOWN BOARD OF THE TOWN OF BROOKHAVEN advises the Court that other than municipal agencies and municipal subdivisions of the TOWN OF BROOKHAVEN, they have no parents, subsidiaries or affiliates.

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PRELIMINARY STATEMENT

In *Kelo v. City of New London*, 545 U.S. 469, 126 S.Ct. 24 (2005), the City of New London proposed a taking to develop a large commercial center in order to economically revitalize the City through new construction, new job creation and an increased tax base. In *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008), *cert. denied* 128 S.Ct. 2964, 171 L.Ed.2d 906 (2008), the City of New York proposed a taking for an ambitious development project to build a sports arena, office buildings, housing, and commercial space. Both of these proposed takings involved the displacement of longtime residents from their homes.

In striking contrast to the above, in March, 2006 the Town of Brookhaven proposed a taking to preserve a parcel of farmland for the purpose of maintaining its century-long use as farmland and open space.[3] No residents would be displaced by this proposal. In accordance with the rulings in *Kelo* and *Goldstein*, the courts below properly upheld the proposed taking here by the Town of Brookhaven.

This case involves the use of eminent domain in support of the proposed preservation as farmland and open space of a 39.16-acre parcel of property owned by Aspen Creek Estates, Ltd. (Aspen or Petitioner). This preservation is part of a greater plan to preserve the last remaining large, contiguous working farm-belt in the Town of Brookhaven (Town or

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[3] Petitioner inaccurately states "the Town condemned Aspen's property on March 21, 2006 . . ." (Petition p. 2). In fact, at this time the Vesting application is pending in the New York State Supreme Court.

Respondents). Although it has not presented a single basis for disputing this stated public purpose, Aspen makes the far-reaching claim that condemning its property would violate the Public Use Clause of the Fifth Amendment to the US Constitution because the municipality who approved the taking was motivated by the primary desire to enrich one private farmer, and thus the stated public purposes are merely a "pretext". Aspen bases this pretext claim on nothing but conclusory allegations that are not narrowly asserted or supported by evidence. The courts below properly concluded that the allegations had no merit, that the stated public purpose was proper, and that there was no pretext involved in the use of eminent domain here.

The Town of Brookhaven is a municipal corporation under the laws of the State of New York. Aspen Creek Estates, Ltd. is a private corporation who owns title to the subject-property (Property). One of the primary roles of the Town is to balance the competing interests of land development and preservation. Of additional importance in this regard are the wishes of the public at large as to how they would like to shape the future of their local community. In a farming community such as Manorville, the preservation of farmland in the midst of one of the last remaining contiguous working farm-belts in the area is vital to the community, and might be impossible without the use of condemnation.

This case is a garden variety challenge to a proper municipal taking. Although Aspen calls this an economic development taking case like *Kelo v. City of New London*, 545 U.S. 469, 126 S.Ct. 24 (2005), this taking is not for "economic development" as was faced in *Kelo*, or in *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008), *cert. denied* 128 S.Ct. 2964, 171 L.Ed.2d 906, 2008 WL 891093 (2008). Those matters involved the acquisition of property for ambitious, complex and sophisticated development plans to enhance and convert possibly blighted areas to those that would create jobs, increase the tax base, and foster economic growth within the community. Here, the Town proposes to create an alternative to development and to maintain the general character of a county that was once mostly agricultural. The area in particular has long been utilized for agricultural purposes. This parcel is another piece of a puzzle in the midst of a 500+ acre area which is sought to be maintained undeveloped to retain its open space and agricultural character.

Aspen purchased the property by outbidding the Town in 2004, and proposed building 19 residential homes on the parcel. The Town attempted to negotiate a purchase and offered as much as $4,004,000, which was rejected. When all efforts to purchase the property at the then-market value failed, as a last resort the Town proceeded pursuant to New York's Eminent Domain Procedure Law (EDPL) to acquire the property to at least save the rural nature of a portion of the county.

Aspen's challenge is based solely upon its misconception of Justice Kennedy's concurring opinion in *Kelo*. Aspen asserts that the taking here does not comply with *Kelo* in that there is no carefully considered development plan. However, this is not the holding in *Kelo*. Justice Kennedy relied on New London's plan as one of the reasons for finding that the taking was proper, but he went to great lengths to reaffirm the standard of review set forth in this Court's prior jurisprudence.[4] Moreover, the plan in *Kelo*, like *Goldstein v. Pataki*,[5] was in fact for a large-scale development project while here the Town's objective is to preserve farmland and open space, which purposes are statutorily recognized in New York as being a proper public purpose.

Aspen does not raise any meritorious arguments in its Petition. Instead, it seeks to distract the Court from the very narrow scope of review that is afforded review of a decision of a proceeding held pursuant to EDPL § 207. Aspen introduces extended discussion of a different lawsuit (a proceeding under Article 78 of the New York Civil Practice Law and Rules) involving some of the same parties in a different court involving different issues. Those issues were not tried below, were not part of the underlying proceeding, and are not within the scope of this Court's review. That other matter is pending on appeal due to several significant errors of fact and law made by the trial court. As the decisions below[6] demonstrate, the taking here followed a lengthy period of good faith negotiation to purchase the parcel in order that the Town could preserve the last remaining large, contiguous tract of farmland in the Town of Brookhaven. Arguments not bearing on the issues involved in the EDPL § 207 proceeding are not relevant to this Petition. Accordingly, this Court should decline to review the decisions below.

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[4] See *Berman v. Parker*, 348 U.S. 26 (1954); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). *See also Didden v. Vill. of Port Chester*, 173 Fed. Appx. 931 (2d Cir. 2006), 2006 WL 898093.

[5] In 2008, this Court denied the petition for a writ of certiorari in *Goldstein v. Pataki*. Aspen fails to even refer to that case in its Petition.

[6] The December 4, 2007 Opinion & Judgment of the Appellate Division, Second Department, and the February 17, 2009 Memorandum Opinion of the New York Court of Appeals are hereinafter referred to as "the decisions below".

STATEMENT OF THE CASE

A. The Town's Stated Public Purpose for Acquiring Aspen's Parcel

The Town of Brookhaven proposes to acquire through its right and power of eminent domain 39.16 acres of farmland owned by the Petitioner herein, Aspen Creek Estates, Ltd. The Town of Brookhaven, The County of Suffolk and the State of New York have been long-standing proponents of preserving farmland, maintaining open space and scenic vistas, and retaining the local character of the community. The importance of these objectives are illustrated in New York State statutes (General Municipal Law § 247, Agriculture and Markets Law § 3), the Suffolk County Agriculture and Farmland Protection Plan (1996), Town of Brookhaven Bond Acts (Open Space Preservation Act of 2002), Clean Water Open Space Bond Act (2004)), as well as Community Studies (Manorville Taxpayers Association Hamlet Study (1993)), and a steady stream of public comments made at public hearings.

The Town has made significant progress, negotiating for the acquisition of farmland and/or their development rights, to achieve the above-mentioned goals. As a result of these efforts, large tracts of farmland and open spaces have been preserved over a period of years, which has helped to maintain the rural character of the community.

The Town earmarked for preservation a 500+ acre tract of land in the Manorville area of Brookhaven that includes the subject property. That geographical area, known as the Manorville Farmland Protection Area (MFPA), has been referred to as early as the 1993 Manorville Taxpayers Association Hamlet Study, in programs developed by Suffolk County, and throughout the March 21, 2006 resolution to condemn the subject property. The MFPA has been called "the largest and most contiguous belt of productive agricultural land remaining in the Town of Brookhaven." The Town Open Space Committee approved the protection of all the properties that collectively comprised the MFPA on April 15, 2003.

In order to preserve the MFPA, the Town negotiated for the purchase of certain parcels in fee, for the development rights only to certain parcels, and offered other incentives to farmers who preserved their land as farmland or open space. At the time that the Town conducted a public hearing pursuant to Article 2 of the EDPL, it had already acquired 112 of the 500 acres, and was in the "appraisal" stage on approximately 90 additional acres. Therefore, the Town either held an interest in, or was undertaking efforts to acquire an interest in approximately 200 of the 500 acres comprising the MFPA.[7] The Town's acquisition included four (4) of the surrounding farms located in the immediate vicinity of Aspen's property. Notably, the Town acquired 45.63 acres immediately east of Aspen's property formerly known as the Hoschler Farm, and Suffolk County owns a 21 acre wooded site to the north of Aspen's property. The acquisition of Aspen's property is required to fulfill the Town's goal of preserving the open space and farming character of the Manorville area.

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[7] The Town has continued in its acquisition efforts subsequent to the date of its resolution to use eminent domain.

B. The Proceedings and Decisions Below

Aspen commenced a proceeding pursuant to New York's Eminent Domain Procedure Law § 207 challenging the Town's proposed taking. On December 4, 2007, the Appellate Division, Second Department rendered an Opinion & Judgment in the matter of *Aspen Creek Estates Ltd. v. Town of Brookhaven, 47 A.D.3d 267, 848 N.Y.S.2d 214 (2d Dept. 2007)* that dismissed Aspen's petition and upheld the proposed taking as a proper use of its power of eminent domain.[8] (Pet. App. 5a). The Appellate Division found that the taking satisfied all of the substantive and procedural constitutional requirements necessary for a proper appropriation of the property through Eminent Domain. *Id.*

The Appellate Division found that preservation of farmland was a legitimate public purpose and not a pretext to improperly confer benefits on private persons. After discussing the facts and analyzing this Court's decision in *Kelo v. City of New London*, the Appellate Division found that, "in contrast to *Kelo*, this matter does not involve a proposed taking for economic development", and that, "Neither *Kelo* nor this Court's recent decision in *Matter of 49 WB, LLC v. Vil-*

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[8] References to "(Pet. App.)" refer to the appendix to Aspen's Petition For A Writ of Certiorari.

lage of Haverstraw . . . requires that a proposed condemnation for the preservation of farmland be part of a comprehensive development plan." (Pet. App. 18a). The Court firmly rejected Aspen's reliance on *Kelo* to support its claims, holding:

> "the property lies within a large, contiguous tract of working farmland, and permitting any significant residential development defeats the Town's aim of preserving this entire area. Thus, the Town's determination that acquisition of the entire parcel was necessary to achieve the public purpose of the condemnation was rational, and there is no basis upon which to disturb it." (Pet. App. 21a).

Even the lone dissenting Judge concurred with the majority's holding that the procedural due process requirements were met and that the taking as stated would advance a proper public purpose if applied in good faith. (Pet. App. 24a).

By Decision & Order on Motion dated March 28, 2008, the Appellate Division granted Aspen leave to appeal to New York's highest court, the New York Court of Appeals (Court of Appeals) (Pet. App. 3a). On February 17, 2009, the Court of Appeals affirmed the Appellate Division and denied Aspen's petition. *Aspen Creek Estates v. Town of Brookhaven et al.*, 12 N.E.2d 935, 904 N.E.2d 816, 876 N.Y.S.2d 680 (2009) (Pet. App. 1a). The February 17, 2009 decision complied with existing Supreme Court precedent, New York's own precedent, New York State statutes and local ordinances and land-use plans with the stated policy to protect and preserve farmland and open space. In its short decision, the Court of Appeals did not make new law or implement an amorphous "public policy" standard as Aspen suggests. The Court simply identified as legitimate New York State's and local municipalities' longstanding and legislatively declared public policy that preserving farmland and open space is a benefit to the public. Once the public benefit had been identified and the taking held to be rationally related thereto, the Court of Appeals found that the Fifth Amendment was satisfied. Regarding Aspen's claim of pretext, the Court of Appeals held that, "In short, the public benefits of the taking in this case were not incidental or pretextual in comparison with benefits to particular, favored private entities". (Pet. App. 2a).

SUMMARY OF REASONS FOR DENYING THE PETITION

Judicial deference is required when reviewing municipal takings because in our system of government legislators are better able to assess what public purposes should be advanced by exercise of the taking power. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008), *cert. denied* 128 S.Ct. 2964, 171 L.Ed.2d 906, 2008 WL 891093 (2008). Courts are not to substitute their judgment for that of a legislature as to what constitutes a public use unless the use is palpably without reasonable foundation. *Kelo v. City of New London, supra; Midkiff, supra; Berman v. Parker*, 348 U.S. 26 (1954); *Goldstein v. Pataki supra.* Moreover, the role of the courts in determining what constitutes a public purpose is an extremely narrow one. *Berman v. Parker; Goldstein v. Pataki, citing United States ex rel Tenn. Valley Authority v. Welch*, 327 U.S. 546, 66 S.Ct. 715 (1946).

Aspen's allegations in the courts below and the instant Petition fly in the face of long existing New York State and Federal case and statutory law. It is well-settled that a municipality's right and power of eminent domain is one of the powers inherent in the state as sovereign to take private property for public use. The only constitutional limitation upon the exercise of the power is that the use must be for a public purpose, just compensation must be made, and due process of law observed. *See Brown v. Legal Foundation of Washington*, 538 U.S. 216, 123 S.Ct. 1406 (2003); *Kelo v. City of New London, supra; Brody v. Village of Port Chester*,434 F.3d. 121 (2d Cir. 2005).

The State of New York, County of Suffolk and Town of Brookhaven have established through statutes and their own actions an existing policy of farmland and open space preservation. The voice of the public at the Eminent Domain Procedure Law Article 2 hearing made it abundantly clear that there is a strong public interest in preserving the open space and agricultural nature of the subject property and that residential development would severely and adversely alter the character of the neighborhood.

While Aspen asserts that its argument is supported by the holding in *Kelo v. City of New London, supra*, it fails to recognize that the United States Supreme Court found that a taking even for economic development that envisioned a transfer of title to a private entity constituted a proper public purpose. In *Goldstein v. Pataki, supra,*[9] the Second Circuit Court of Appeals upheld as constitutional a taking which would transfer title to a private entity to construct a sports arena, high rise apartment houses, luxury housing, a hotel, and several office towers. It also held that the taking of non-blighted portions of the area were appropriate. Here, the taking is not even for economic development, and not to transfer title to a non-governmental entity. The purpose of this taking is to preserve farmland and open space. It is well-settled that local municipalities have the right to regulate land use and to balance development with land preservation, and accordingly, the Petition for a writ of certiorari should be denied.

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[9] In *Goldstein v. New York State Urban Dev. Corp.*, --- N.Y.S.2d ----, 2009 WL 1350606 2009 N.Y. Slip Op. 03903, the New York State Appellate Division, Second Department recently upheld the constitutionality of the proposed taking on an EDPL § 207 application which followed the Second Circuit decision cited above.

REASONS FOR DENYING THE PETITION

POINT I. THE DECISIONS BELOW CONFORM WITH THIS COURT'S LONGSTANDING PRECEDENTS

A. The Condemnation is in Furtherance of a Proper Public Purpose

The decisions below are a straightforward application of this Court's long-standing precedents concerning the deferential level of judicial review accorded to public use determinations – precedents that were reaffirmed in *Kelo v. City of New London*, 545 U.S. 469 (2005).

When reviewing whether a public benefit or use exists to support the exercise of eminent domain, the public use is to be broadly defined, and review is limited to ascertaining whether the project is rationally related to a conceivable public purpose. *Midkiff, supra; Berman v. Parker, supra.* More specifically, public use is broadly defined to, "embrace the broader and more natural interpretation of public use as 'public purpose'". *Kelo* at 2662.

The law flatly rejects Aspen's contentions that the preservation of farmland is not a proper public purpose. The decision to condemn furthering a public purpose is entitled to a high degree of deference by the courts. *Berman v. Parker*, 348 U.S. at 33, is relevant to this issue. In *Berman*, this Court upheld the taking of private property by the local Planning Commission as part of its community redevelopment plan, stating, "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.; *See also Midkiff*, 467 U.S. at 241 ("[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.").

Here the Town's Findings and Determinations set forth that:

> The purpose of the acquisition is: to preserve open space and agricultural resources . . . to help protect and promote continuation of agriculture in the Town . . . to ensure the retention of scenic vistas . . . and the Manorville Farm Protection Area. (Pet. App. 30a).

Preserving farmland is a well-established public purpose in New York. The proposed taking is consistent with the policy of the Town of Brookhaven's Clean Water Open Space Bond Act, *Town of Brookhaven Clean Water Open Space Bond Act* (Nov. 3, 2004), and Open Space Preservation Act of 2002, *Town of Brookhaven Open Space Preservation Act of 2002* (Nov. 5, 2002).

The Town's Environmental Bond Act Open Space Advisory Committee initially approved acquisition of the subject-property, and thereafter approved the entire 500-acre MFPA. Subsequently, the citizens of the Town of Brookhaven passed a bond resolution entitled "Clean Water Open Space Bond Act (2004)," which authorized "the acquisition of interests or rights in real property in the Town for the preservation of open space, farmland and wildlife habitats . . . for purposes including but not limited to . . . the preservation of community character." *Town of Brookhaven Clean Water Open Space Bond Act* (Nov. 3, 2004).

The Open Space Preservation Act of 2002 authorizes the acquisition of "interests or rights in real property in the town, including, but not limited to, development rights in agricultural lands, for the preservation of open spaces . . .." *Town of Brookhaven Open Space Preservation Act of 2002* (Nov. 5, 2002).

The Suffolk County Agriculture and Farmland Protection Plan (1996) also demonstrates that preserving farmland is a proper public purpose on which to justify the use of eminent domain. One of the "planning goals" of the County Program is the preservation of farmland as an important natural resource. The Program explains how and why farmland preservation is essential to Suffolk County's ability to retain a viable agriculture industry, to maintain its historical fabric, community identity, value as a destination for tourism, and to provide tax paying open space. *See Suffolk County Agriculture and Farmland Protection Plan (1996)*, p.12.

References to New York State policies and statutes further highlight the fact that the preservation of farmland constitutes a legislative interest and a proper public purpose. In setting forth the policy and purposes of *New York Agriculture and Markets Law*, the legislature provides, "The agricultural industry... vitally concerns and affects the welfare, health, economic well-being and productive and industrial capabilities of all our people. *It is the policy and duty of the state to promote, foster, and encourage the agri-*

cultural industry." *NY Agriculture and Markets Law* § 3 (McKinney 2008)(emphasis added). Preserving farmland falls directly in line with New York State's policy of fostering and promoting agriculture and thus clearly constitutes a stated public purpose in line with the Constitutional mandates.

New York General Municipal Law § 247 (McKinney 2008) demonstrates that the acquisition of rights in real property for the preservation of farmland constitutes a public purpose. GML § 247 (2) states in relevant part, "The acquisition of interests or rights in real property for the *preservation of open spaces and areas* shall constitute a public purpose . . . and any . . . town or village . . . may acquire . . . the fee or any lesser interest . . . necessary to achieve the purposes of this chapter." (Emphasis added). GML § 247 (1) defines an "open space" or "open area" as

> "any space or area . . . whose existing openness, natural condition, or present state of use, if retained would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of *natural or scenic resources.* For purpose of this section natural resources shall include but not be limited *to agricultural lands defined as open lands actually used in bona fide agricultural production.*" (Emphasis added).

Setting the definitions of "natural or scenic resources" and "open space" in place, GML § 247 establishes the principle that preserving agricultural lands for agricultural use constitutes a public purpose.

The United States Court of Appeals for the Second Circuit recently analyzed the issue of public purpose with respect to an ambitious project involving development of property known as the Atlantic Yards in Brooklyn, New York, in the matter of *Goldstein v. Pataki, supra.*[10] *Goldstein* reviewed the leading cases decided by the United States Supreme and other Federal Courts, most notably *Kelo v. City of New London*, 545 U.S. 469, 126 S.Ct. 24 (2005); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321 (1984); *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98 (1954); and *Brody v. Village of Port Chester*, 434 F.3d. 121 (2d Cir. 2005). The leading jurisprudence in New York, *Jackson v. New York State Urban Development Corp.* 67 N.Y.2d 400, N.Y.S.2d 298 (1986), and a long line of Appellate Division cases in different departments, when read together with the federal cases establish the propriety of the findings and determinations of the Town of Brookhaven here. The New York courts below correctly reviewed the history of Eminent Domain proceedings both pre and post-*Kelo*, and made a well-reasoned determination dismissing the claim that the proposed taking was unconstitutional, and upholding the actions of the Town.

Aspen has not offered a single basis to deny the legitimacy of preserving farmland and open space as a proper public purpose. Applying the constitutional principles set forth in *Kelo, Berman, Midkiff, and Goldstein* to the facts at hand, the proposed taking here plainly passes constitutional muster and Aspen's Petition should be denied.

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[10] Aspen fails to reference this significant case even though it bears directly on the issues presented herein.

B. This Was Not A Taking for Economic Development

A taking to preserve land is not a taking for economic development. Aspen attempts to frame the Town's acquisition of the subject-property as a taking for "economic development" in order to bring this case within the framework of Justice Kennedy's concurring opinion in *Kelo v. City of New London*, 545 U.S. 469 (2005), which suggests the requirement of a development plan before a condemning authority can act in furtherance of an economic development-type taking.[11] However, this case is not one for economic development, is not New York's version of *Kelo*,[12] and is an example of an ordinary municipal taking. This proposed acquisition should not be considered in the same breath with *Kelo* or *Goldstein v. Pataki*. Nonetheless, those cases are clearly significant, as they have upheld the constitutionality of takings far more elaborate and more generally invasive to the owners than is proposed herein.

Aspen's assertions are plainly contradicted by the evidence submitted at the local public hearing held pursuant to Article 2 of the EDPL, which demonstrates that the land is being acquired pursuant to a farmland preservation plan and not for economic development. Aspen has not offered any proof to contradict or challenge the express findings and determinations based on the EDPL hearing.

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[11] This suggestion is not made a part of the majority opinion.

[12] In *Goldstein v. Pataki*, the court surmises that Justice Kennedy "may have intended this caveat to apply exclusively to cases where the sole ground asserted for the taking was economic development." *Id.* at 64, n. 10.

Furthermore, even if preserving farmland was to somehow be considered "economic development," the Town has in fact acted according to a land preservation plan. Both the Town and Suffolk County have targeted the 500+ acres in which Aspen's property is located as the Manorville Farmland Protection Area (MFPA) for preservation, and has successfully preserved a significant portion of this area for farming.

Preservation of open space for agricultural purposes has been recognized in multiple New York State statutes, the Suffolk County Agriculture and Farmland Protection Plan (1996), and by the citizens of Brookhaven in the Open Space Preservation Act (2002) and the Clean Water Open Space Bond Act (2004). Aspen misstates that, at oral argument before the New York State Court of Appeals, the Town admitted that there was no plan. (Aspen Petition at pp. 2, 4, 15). That is a mischaracterization. The Town explained that the plan consisted of the various statutes, the history of public discussion of the MFPA, and the actions taken to acquire title and/or farmland development rights in the area constituting the MFPA.[13]

The constitutionality of this taking is supported by *Kelo v. City of New London, supra. Kelo* established that a taking even for economic development is proper and constitutional. There, the purposes of acquisition were far more extensive than the land preservation sought here. While in *Kelo* the legislative body proposed taking private property to convey rights to a corporation for development of corporate headquarters and other uses, here the taking is to preserve open space and maintain ownership in the municipal entity. *Kelo* is clearly consistent with existing New York law, and leaves no doubt that courts should and will defer to legislative determinations regarding the propriety of takings for public purposes, and/or uses, even where the taking is for economic development. *Goldstein v. Pataki, supra*, citing *Midkiff*.

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[13] The Town objects to Apen's mischaracterization, in accordance with Rule 15.2 of this Court.

Aspen's reliance on *Kelo* is truly odd. First, Kelo is an economic development case, while this case is not.[14] Second, in *Kelo* Justice Kennedy (on whose concurring opinion Aspen relies) stated that the standard of review on the issue of public purpose weighs in favor of the government, whose findings will be sustained unless the presumption of regularity is overcome beyond a reasonable doubt. *Id.* at 490.

Here, the Town of Brookhaven is taking land to preserve farmland, scenic vistas, and to maintain the overall character of the community without any proof that a particular known private party will be benefited. The Town has determined that this preservation will benefit the public at large. While in *Kelo* and *Goldstein v. Pataki* arguments were raised as to impermissible favoritism to private parties, those facts are a far cry from here. Any benefit to a supposed private individual through a hypothetical future lease to continue farming a parcel in the midst of a large, working farm-belt, would be incidental to the basic purpose of the acquisition.[15]

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[14] This Court granted certiorari in *Kelo* "to determine whether a city's decision to take property *for the purpose of economic development* satisfies the 'public use' requirement of the Fifth Amendment." *Kelo*, 545 U.S. at 477 (emphasis added).

Aspen's reliance on *Kelo* is therefore misplaced. Even a cursory reading of this Court's opinion in that case establishes that the *Kelo* facts are distinguishable from those here. The proposed taking here is not such as might offend the populace as the taking in *Kelo* might have. In *Kelo*, the City exercised its eminent domain power to condemn private property as part of an economic development plan designed to create jobs, to increase the tax base and other revenues, and to revitalize an economically distressed city. *Id.* at 2658. The *Kelo* petitioners claimed that the taking was unconstitutional since the City's disposition of the property was not a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the Constitution (applicable to the States through the 14th Amendment). *Id.* In holding that economic development was in fact a proper public purpose for which to use the power of eminent domain, the majority opinion stated, "For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." *Id.* at 2664 (emphasis added). This Court reasoned that, "As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts." Therefore, the City's "determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference." *Id.* at 2665.

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[15] Aspen's assertion that a neighboring farmer will benefit from the condemnation is wholly unsupported, and the statements made at the local public hearing are misconstrued by Aspen in its Petition herein.

Applying the *Kelo* Court's reasoning to the instant case as the courts below did, the Town of Brookhaven is entitled to broad latitude in determining a proper public purpose and in attempting to balance the use of property by rationally controlling over-development. Like the City of New London in *Kelo*, the Town of Brookhaven is endeavoring to form a whole greater than the sum of its parts, in the form of a large contiguous tract of farmland (MFPA).[16] Under the majority's reasoning, the courts below properly deferred to the Town of Brookhaven's determination regarding the legislative reasoning behind the proposed taking.

Aspen's claim that in order to condemn property for the preservation of farmland the taking must be in accordance with a carefully considered development plan, is not well founded and *Kelo* does not stand for this proposition. Aside from overlooking the absence of any requirement in the majority opinion that a carefully considered development plan must exist to support a taking for economic development, Aspen goes even further and misinterprets Justice Kennedy's concurrence to hold that such a plan must exist. Aspen's assertions are entirely false. In his concurring opinion, Justice Kennedy reaffirmed that "no departure from *Berman* and *Midkiff* is appropriate here." *Id.* at 2670. He concluded by stating that, "while there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose, no such circumstances are present in this case." *Id.* at 2670-71. The plain language of Justice Kennedy's opinion, together with the majority opinion, reveal that there is absolutely no obligation to have a carefully considered development plan in order to meet the constitutional requirements of the takings clause.

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[16] During further discussion of the public purpose issue in *Kelo*, Justice Stevens pointed out, "In our cases upholding takings that facilitated *agriculture* and mining, for example, we emphasized the importance of those industries to the welfare of the States in question." (Emphasis added, citations omitted). *Id.* at 2665.

Moreover, since the Town has already preserved hundreds of acres of farmland near and around Aspen's property, it is clear that the Town is acting pursuant to its stated goals of preserving farmland and open space in this area. There is a public benefit to balancing development with land preservation, and limiting development in certain areas in favor of land preservation, open spaces, and continuation of a farming community.

It would simply be illogical to require an economic development plan when the taking is for non-development, land preservation, maintaining farmland, protecting the rural nature of the community, and where the economic benefit, if any, is only incidental to the primary purpose of the taking. Where as here the Town wishes to condemn the subject property to continue its use as farmland, the Appellate Division's reasoning is clear (Pet. App. 18a):

> Neither Kelo, nor this Court's recent decision in Matter of 49 WB, LLC v. Village of Haverstraw, upon which our dissenting colleague also relies, requires that a proposed condemnation for the preservation of farmland be part of a comprehensive development plan.

For these reasons, this Court should deny Aspen's Petition.

C. The Preservation of Farmland and Open Spaces is Not a Pretext and Aspen's Claim That It's Land Is Being Taken Merely To Benefit A Private Person Is Incredible And Was Properly Rejected

Aspen curiously argues that *Kelo* expanded rather than constricted the degree of constitutional scrutiny under the Public Use Clause. It contends that a public use challenge can now proceed by merely alleging an intent to benefit a private party – even if the public purposes of the condemnation are otherwise valid. Given that *Kelo* reaffirmed the deferential standard of judicial scrutiny of *Berman* and *Midkiff*, Aspen's argument must be rejected and its Petition denied.

Aspen suggests that the Town is taking property under the mere pretext of a public purpose, but that its actual purposes are (1) to bestow upon a private individual the benefit of allowing him to farm the property; and (2) to block further development on the property in order to increase the value and appeal of already existing homes, under the guise of the farmland protection plan. These arguments are meritless. As the Appellate Division noted, the record is barren of any indication that the Town's motivation was improper. (Pet. App. 20a). Surely the general public, including the surrounding homeowners, will benefit by maintaining the character of the neighborhood, which is what enticed them to move to the area in the first place.

Aspen's claim that the taking is actually for the benefit of one private individual is without merit. The record is devoid of any contract, lease, or other agreement between the Town and any private party with regard to the subject property, and there is no indication that such an agreement has been made. The record does not even hint that this property is being taken for the benefit of a private individual. It is well settled that any incidental benefit to a private party does not render invalid a taking made pursuant to a proper public purpose. *Kelo* at 2664, citing *Midkiff*; *Goldstein, supra.*

"Prior to *Kelo,* no Supreme Court decision had endorsed the notion of 'pretext' claim, although a few lone court cases contained language suggesting that a pretextual public use may be invalid." *Goldstein v. Pataki,* 516 F.3d 50 (2d Cir. 2008), *cert. denied* 128 S.Ct. 2964, 171 L.Ed.2d 906, 2008 WL 891093 (2008). The *Goldstein* Court went on to state that, "In contrast, the particular kind of 'pretext' claim that the plaintiffs in this case advance bears an especially dubious jurisprudential pedigree." *Id.* at 62. The claim in *Gold-*

stein was that the taking was solely to confer a private benefit upon the developer. Here, the claim is that the taking is solely to benefit an individual farmer. The *Goldstein* court, citing *Kelo*, stated that "allowing such a claim to go forward, founded only on mere suspicion would add an unprecedented level of intrusion into the process." *Id.* at 62. Similar to *Goldstein*, the courts below rejected Aspen's claim of pretext.

Even assuming Aspen's allegations had support and the Town intended to allow a private individual to farm the property, *Kelo* reminds us that this would not diminish the public character of the taking. " '[I]t is only the taking's purpose, and not its mechanics,' we explained, that matters in determining public use." *Id.* at 482, quoting *Midkiff*, 467 U.S. at 244. The Court noted that in *Midkiff*, "the property in question retained the same use even after the change of ownership." *Id* at 486. Justice Stevens effectively forecloses Aspen's objection with the reminder that "the government's pursuit of a public purpose will often benefit individual private parties." *Id.*

The Appellate Division's reasoning on this issue is particularly compelling (Pet. App. 20a):

> Since allowing farming to continue on the property is fully consistent with the purpose of this condemnation, the fact that one or more individual farmers may benefit is merely incidental, and does not render the public benefit to be achieved by condemnation illusory.

In *Goldstein v. Pataki*, the condemnee alleged that the taking did not serve a public purpose but rather was designed to impermissibly benefit the developer of the project. 516 F.3d at 54. The Second Circuit Court of Appeals pointed out that it was not known who would be occupying the apartments to be created and therefore the stated public purpose of the taking was not pretextual. The Second Circuit's analysis in *Goldstein* is instructive:

> "We do not read *Kelo's* reference to 'pretext' as demanding, as the appellants would apparently have it, a full judicial inquiry into the subjective motivation of every official who supported the Project, an exercise as fraught with conceptual and practical difficulties as with state-sovereignty and separation-of-power concerns. Beyond being conclusory, the claim that the 'decision to take Plaintiffs' properties serves only one purpose' defies both logic and experience. 'Legislative decisions to invoke the power to condemn are by their nature political accommodations of competing concerns.' *Brody v. Vill. Of Port Chester*, 434 F.3d 121, 136 (2d Cir. 2005)." *Id.* at 63.

In *Kelo*, the Court stated that the identities of the private entities who would benefit were not known when the plan was adopted, and "[I]t is, of course, difficult to accuse the government of having taken A's property to benefit the private interests of B when the identity of B was unknown." *Id.* at 478, n.6.

Here, it is only the subjective motivation of officials that Aspen seeks to challenge as improper or pretextual. Other courts have refused to recognize a pretext claim in the face of much less support for valid public purposes than presented here. It bears emphasis that not a single statement in any of the submissions below alleged any *fact* demonstrating that the public officials who approved the condemnation had or could have had any reason to abdicate their professional and public responsibilities in order to collude for the sole purpose of enriching a private individual. Although Aspen's claims are far-reaching, the vague underlying allegations are without merit. Aspen emphasizes allegations that do not even relate to the condemnation but rather to some purported bad faith through which the Planning Department (not a party to this case) denied site plan applications regarding the property. Aspen relies heavily on a related Article 78 proceeding that did not address the issue of whether the public purpose of the taking was pretextual.

Based on the Record and the principles articulated by *Goldstein v. Pataki* and *Kelo*, the decisions below correctly upheld the findings and determinations of the Town and the instant Petition should therefore be denied.

POINT II. ASPEN'S PETITION DOES NOT MEET THE CRITERIA TO OBTAIN CERTIORARI

A. Aspen Has Not Demonstrated A Split Among Federal Circuit Courts

Aspen does not allege a division among federal circuits that would warrant review by this Court. It has not pointed to any fundamental differences among the federal courts on a particular point of law that requires this Court's intervention. More importantly, though, Aspen fails to disclose the controlling Second

Circuit case on condemnation law in the state of New York, *Goldstein v. Pataki, supra,* which is dispositive of Aspen's claims. Aspen did not address that decision before the New York Court of Appeals, and it does not do so in its Petition to this Court. This Court denied the Petition for a writ of certiorari in *Goldstein v. Pataki*, and it should reach the same conclusion in this matter as well.

The settled law of *Berman v. Parker, Hawaii Housing Authority v. Midkiff, Kelo v. City of New London,* and *Goldstein v. Pataki* all dictate that the Town's taking of Aspen's property is constitutional. The lack of any contrary, pertinent case law strongly militates against this Court's review of this matter. Moreover, the decision below does not conflict, but rather is fully in accord with those cases.

B. The Facts In This Case Are Not Compelling Enough To Warrant Review By This Court

The decisions below are squarely in line with a long history of Supreme Court cases. The New York Court of Appeals' decision was a Memorandum Decision; it was not lengthy and did not even warrant a full discussion of the issues raised by Aspen. The New York Court of Appeals quickly disposed of Aspen's claims on the basis that they "lack merit". (Pet. App. 2a).

C. Petitioner Is Requesting That This Court Review All of the Factual Determinations Made by the Courts Below

The instant Petition for a writ of certiorari essentially asks this Court to review detailed factual findings of the courts below. The courts below found that the State of New York, the County of Suffolk and the Town of Brookhaven determined that preserving farmland and open space is beneficial to the general public. The Appellate Division in particular examined the region's long-history of agriculture, and the overwhelmingly rural character of the community. That court made findings as to the number of acres and the location of farmland that had already been preserved. It then examined the steps taken by the Town to ensure that the community's preservation plan was not derailed by Aspen.

By petitioning for a writ of certiorari, Aspen wants this Court to review all of the factual findings made in the courts below and issue new findings in Aspen's favor. In accordance with the normal scope of appellate review, this Court should refuse to act as the fact-finder.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be denied.

Dated: June 16, 2009
Islandia, New York

Respectfully Submitted,

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